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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SAVE THE BAY, INC.,
Petitioner

v.

U.S. CORPS OF ENGINEERS, *et al.*,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether the United States District Court and the Court of Appeals for the Fifth Circuit erred in ruling that:

a) The preparation of an Environmental Impact Statement is not necessary in this case because

1) An environmental assessment by the district engineer was reasonable and based on substantial evidence;

2) The activity herein is not a major federal action significantly affecting the quality of the human environment.

b) In issuing a permit for an outfall pipeline to deliver 2,300,000 gallons of pollutants per day from a massive chemical plant, the Corps of Engineers is not required to consider the environmental cost of the entire project but only the effects of the installation and maintenance of the outfall line itself.

TABLE OF CONTENTS

	Page
Questions Presented For Review	i
Judgment and Opinion Below	2
Jurisdiction	2
Constitutional Provisions and Statutes Involved	2
Statement of the Case	4
Reasons for Granting The Writ	8
Conclusion	12
Certificate	13
Appendix A	
Opinion of the United States Court of Appeals for the Fifth Circuit	1a

TABLE OF AUTHORITIES

CASES:

Citizens for Clean Air, Inc. v. *U.S. Corps of Engineers, et al.*, 349 F. Supp. 696 (S.D.N.Y. 1972)	11
Mahelona v. *Hawaiian Electric Company*, 418 F. Supp. 1328 (D. Hawaii 1976)	11
Port of Astoria v. *Hodel*, 8 ERC 1156, Aff'd, 595 F.2d 467 (9th Cir. 1979)	11

STATUTES:

Title 28, USC Section 4332(2)(c)	2
40 CFR 1500.6(a)	3, 9

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SAVE THE BAY, INC., respectfully petitions for a Writ of Certiorari to review the Opinion of the United States Court of Appeals for the Fifth Circuit which affirmed the judgment of the United States District Court, Southern District of Mississippi, Southern Division, refusing to require the U.S. Corps of Engineers to prepare an Environmental Impact Statement as provided under the National Environmental Policy Act with respect to an outfall pipeline which will discharge 2,000,000 gallons per day of industrial waste water into a pristine estuarian bay from a massive titanium dioxide chemical plant being constructed by E. I. DuPont de Nemours and Co., Inc.

JUDGMENT AND OPINION BELOW

The judgment of the United States District Court refusing to require the U.S. Corps of Engineers to prepare an Environmental Impact Statement and refusing the injunctive relief requested by Petitioner, was affirmed by the United States Court of Appeals for the Fifth Circuit in an Opinion dated January 24, 1980, reported at 610 F.2d 322; Petition for rehearing denied, March 17, 1980. The opinion and the denial of rehearing are attached hereto in Appendix A.

JURISDICTION

The Opinion of the United States Court of Appeals for the Fifth Circuit which is sought to be reviewed was rendered on January 24, 1980.

The per curiam amendment to the Opinion and denial rehearing was rendered March 17, 1980.

The jurisdiction of this Supreme Court is based on 28 USC 1245.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Title 28, USC Section 4332(2) (c)

"The Congress authorizes and directs that to the fullest extent possible. . .

2. All agencies of the Federal Government shall:

(c) Include in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment a detailed statement (EIS) by the responsible official on:

(i) The environmental impact of the proposed action,

(ii) Any adverse and environmental effects which cannot be avoided should the proposal be implemented,

(iii) Alternatives to the proposed action,

(iv) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented . . .

2. Counsel of Environmental Quality Regulations 40 CFR 1500.6(a)

"The statutory clause 'major Federal actions significantly affecting the quality of human environment' is to be construed by agencies with a *view to the overall, cumulative impact of the action, proposed related Federal actions and projects in the area, and further actions contemplated.* Such actions may be localized in their impact, but if there is potential that the environment may be significantly affected, the statement is to be prepared. Proposed major actions, the environmental impact of which is likely to be hightly controversial, should be covered in all cases. In considering what constitutes major action significantly affecting the environment, *agencies should bear in mind that the effect of many Federal decisions about a project or complex of projects can be individually limited but cumulatively considerable.* This can occur when one or more agencies over a period of years puts into a project individually minor but collectively major resources, when one decision involving a limited amount of money is a precedent for action in much larger cases or represents a decision in principle about a future major course of action, or when several government agencies individually make decisions about partial aspects of a major action. In all such cases, an Environmental Statement should be prepared if

it is reasonable to anticipate a cumulatively significant impact on the environment from Federal action. The Council, on the basis of a written assessment of the impacts involved, is available to assist agencies in determining whether specific actions require impact statement." 40 CFR 1500.6(a)

STATEMENT OF THE CASE

The Plaintiff, SAVE THE BAY, INC. is a non-profit corporation organized under the laws of the State of Mississippi. Its members consist of full time and part time residents of Harrison and Hancock Counties in the State of Mississippi and of the vicinity of the Bay of St. Louis (Tr. 1158). The Defendant, DuPont, is a private corporation incorporated under the laws of the State of Delaware, the Federal Defendants are the United States Army, the United States Corps of Engineers, an agency of the United States Government within the Department of the Army, and Colonel Drake Wilson, formerly the District Engineer for the Mobile District of the Corps. (Tr. 1158). The Defendant, DuPont, is presently constructing and plans to operate a massive titanium dioxide manufacturing facility representing an investment of between one hundred twenty-five and one hundred thirty million dollars, (Tr. 293, 471) and encompassing over two thousand acres of land (Tr. 292, 474), (general exhibits 1-4) in Delisle, Mississippi near the Bay of St. Louis, in Harrison County, Mississippi. The plant operation and construction includes waste emission smoke stacks, deep-well disposal of highly toxic chemical wastes, and a pipeline to dump chemical wastes into the Bay of St. Louis as hereafter described. On November 21, 1974, DuPont sought authorization from the Defendant U.S. Corps of Engineers, to install a 24 inch diameter effluent line to discharge approximately two million gallons of industrial pollutants per day (Tr. 505-506) into the Bay of St. Louis. The outfall line

itself extends approximately 2,200 feet into the Bay and is installed by the dredging of a trench resulting in the removal of 610 cubic yards of dredged material.

From the very beginning, the Corps of Engineers considered the question as to whether all or part of the proposed construction should be considered as candidate for an Environmental Impact Statement (Tr. 284), but the Corps determined that only construction of the 24 inch effluent line and appurtenant structures were subject to Corps regulation and thus the Corps limited its assessment, evaluation and evaluation and analysis solely to that feature of the plant construction (Tr. 285).

On February 3, 1975, the Mississippi Air and Water Pollution Control Commission, issued a National Pollutant Discharge Elimination Systems permit to DuPont allowing discharge of the waste water in accordance with the conditions of the permit.

Following solicitation of comments from federal, state and local agencies concerning the proposed pipeline construction permit, the Corps of Engineers announced a public hearing would be held on June 19, 1975, to answer any questions concerning issuing of the pipeline construction permit. In keeping with the Corps' prior determination that only the construction of the pipeline was subject to their regulation, the public notice for the hearing was limited to the installation of the 24 inch diameter pipeline and made no mention of consideration of other aspects of the DuPont Plant in the issuance of its permit. On June 19, 1975 the hearing was held and all proponents and opponents were allowed to express their views. The proponents consisted mostly of governmental or business organizations and generally testified as to the favorable economic impact the plant would have. The opponents, consisting mostly of ecological and recreational organizations, and scientists, testified that the environmental damage and impact of the DuPont

project will reach far beyond deterioration of the water quality and that potential dangers to the marine and land environment necessitated the minimal protection of an environmental impact statement.

The vast majority of the public response and virtually all the authoritative scientific evidence was unalterably opposed to the location of the DuPont plant in its selected site; opposed to the granting of the permit for the outfall pipeline; and overwhelmingly in favor of the initiation by the Corps of Engineers of a comprehensive Environmental Impact Statement.

On July 17, 1975, the U.S. Corps of Engineers issued a statement of Findings allegedly assessing the impact the proposed activity would have on the environment. The Corps findings, as was its public notice, was predicated on the initial determination that the only potential environmental damages which the Corps would assess would be those adverse affects caused directly by the construction of the 220 feet outfall line and excavation of 610 cubic yards of dredged material from the Bay.

The Corps explicitly stated that all other environmental damages caused by the massive DuPont titanium dioxide plant would not be assessed and were not included in the Corps decision to not require an environmental impact statement.

Based on the administrative record, which was replete with demands for an environmental impact statement and which evidenced one of the most controversial environmental issues ever to appear in the State of Mississippi, the Corps nevertheless directed that the permits be issued without the protection of an environmental impact statement.

The Plaintiff, SAVE THE BAY, INC. brought suit pursuant to the National Environmental Policy Act (NEPA 28 USC 4321 ex seq) against the United States

Corps of Engineers, the United States Army, Colonel Drake Wilson, Mobile District Office of the Corps of Engineers, and DuPont seeking declaratory and injunctive relief and monetary damages. The case was referred to the United States Magistrate by the District Judge and thereafter the Defendant's Motions for Summary Judgment were granted and judgment was entered December 16, 1977 dismissing the complaint with prejudice.

Plaintiff, SAVE THE BAY, INC. appealed. On January 24, 1980 the U.S. Court of Appeals for the Fifth Circuit issued an opinion affirming the District Court's opinion and denying Plaintiff the relief requested.

The DuPont plant is now almost in operation. The construction was begun and has been continuing despite three years of pleas by Appellant, SAVE THE BAY, INC. for the very minimal protection of an Environmental Impact Statement.

So far DuPont has obtained or is attempting to obtain permits from the following agencies:

1. Mississippi Air and Water Pollution Control Commission,
2. Mississippi Marine Resources Counsel,
3. Mississippi Oil and Gas Board,
4. United States Army Corps of Engineers,
5. United States Coast Guard, and
6. The Interstate Commerce Commission.

Not one of these agencies prepared or is attempting to prepare an Environmental Impact Statement on the DuPont project.

The perspective of each agency when approached for a permit has been to consider piecemeal only that part of the massive project which is directly regulated by

that particular agency. The State agencies have studied only a simulated effluent to be discharged into the Bay of St. Louis at the rate of 2,000,000 gallons per day. Those State agencies have further allowed the installation and use of deep-well disposal of highly toxic chemical wastes on the DuPont plant site which will one day endanger the water supply of the entire Mississippi Gulf Coast. The United States Coast Guard has issued a bridge permit to allow construction of a railroad bridge pursuant to a railroad spur being built to the DuPont plant. The Interstate Commerce Commission has issued a permit to allow operation of the same railroad spur. The United States Corps of Engineers has issued the outfall construction permit in the instant case as well as another permit relative to the railroad spur.

The massive DuPont chemical plant could not be built, could not operate and could not damage the environment without the issuance of these vital federal permits. The permits not only allow construction, they allow massive environmental impact.

The Court of Appeals for the Fifth Circuit has determined that the Corps acted reasonably. The Court said the Corps was justified in assessing only the environmental damage due to construction aspects of the twenty-two hundred feet of pipeline and has no duty to consider the obvious and substantial environmental damages caused by the massive chemical plant itself.

We strongly dissent.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals that federal permitting agencies, in issuing permits for portions of private construction projects must only review the environmental damage of the particular portion of the project which that federal agency regulates is directly contrary

to an explicit regulation of the Council on Environmental Quality and in conflict with the prior environmental decisions of this Court and other Circuit Courts of Appeal.

In concrete terms for the Petitioner herein the decision will mean that E. I. DuPont can build a $150,000,000 titanium dioxide chemical plant with appurtenant structures for the deep well injection of highly toxic wastes and for piping 2,000,000 gallons of industrial waste water a day to dump into a pristine estuarian bay, and an adjacent thirteen mile railroad spur to ship in chlorine gas and other chemicals and that all of the federal permits necessary for this construction can be issued without the very minimal protection of an Environmental Impact Statement.

I.

The Court of Appeals classification of the entire federal permitting system as "incidental involvement" in massive private construction projects for the purposes of NEPA analysis adopts the piecemeal "blinder" approach which has been rejected by every Circuit Court and by the Council on Environmental Quality (CEQ).

The CEQ Regulation in question, 40 CFR 1500.6(a) (set forth verbatim at page 3 herein) explicitly states:

> "In considering what constitutes major (federal) action significantly affecting the environment, agencies should bear in mind that the effect of many *federal decisions* about a project or complex of projects *can be individually limited but cumulatively considerable.* This can occur when one or more agencies over a period of years puts into a project individually minor but collectively major resources, when one decision involving a limited amount of money is a precedent for action in much larger cases or represents a decision in principle about a future major course of action, or when several government

agencies individually make decisions about partial aspects of a major action.

"*In all such cases,* an EIS should be prepared. . ."

In the case *sub judice,* the Court of Appeals panel in oral argument and in its Opinion under the section entitled "A Major Federal Action?" took the position that issuing federal permits was merely "incidental federal involvement" and did not federalize the massive private construction. The panel's position is taken despite the intimate involvement of four federal agencies in reviewing and issuing the numerous federal permits necessary for the massive chemical plant, the deep-well toxic waste disposal, the railroad constructed to the plant and the waste-water pipeline constructed to dump 2,000,000 gallons a day of industrial wastes into the Bay of St. Louis.

NEPA was passed specifically to halt the multi-agency, piecemeal consideration of environmental impact. NEPA's whole essence is the comprehensive assessment of environmental impact in the planning stages of a project. The decision here is to throwback to pre-NEPA 1969 thinking.

II.

The second question presented, and as the Court of Appeals noted, perhaps the point which controls the outcome of the case, is the ruling that the Corps must look only to the environmental consequences of the pipeline construction and maintenance instead of considering the entire DuPont project in its decision on whether or not to prepare an EIS.

Without the federal permits, including the Corp's permit for construction of the waste-water pipeline directly from the massive plant over wet lands to the Bay of St. Louis, the DuPont project could not have been built and could not exist.

This massive chemical plant is analogous to a living organism which eats chlorine gas and at the other end excretes toxic wastes and industrial pollutants at the rate of over 2,000,000 gallons per day. Without the permit, there would be no pipeline. Without the pipeline, the plant would suffocate in its own waste and the Bay of St. Louis would live. With the pipeline, the Bay of St. Louis will die.

To allow the Corps to put on blinders and completely ignore the environmental ramifications of the federal permits is the most niggardly, narrow-minded approach to environmental planning that one can imagine

The cases of *Port of Astoria* v. *Hodel*, 8 ERC 1156, Aff'd 595 F.2d 467 (9th Cir. 1979), *Mahelona* v. *Hawaiian Electric Company*, 418 F. Supp. 1328 (D. Hawaii 1976) and *Citizens for Clean Air, Inc.* v. *U.S. Corps of Engineers, et al.*, 349 F. Supp. 696 (S.D.N.Y. 1972) provide a sound analysis for Petitioner's position that the whole project must be considered and not just 2,200 feet of pipe. We respectfully disagree with the Court of Appeals that those cases are distinguishable.

The Corps approach, affirmed by the Opinion of the Court of Appeals, allows an environmental analysis of 2,200 feet of pipe just as if the pipe was lying out in the marshes of South Mississippi without a massive chemical plant at one end and 2,000,000 gallons a day of industrial waste spewing out the other end. We expect that type of attitude from the U.S. Corps of Engineers, but we are keenly disappointed that the attitude also prevails in the Fifth Circuit Court of Appeals.

CONCLUSION

This case is the most important environmental law case ever to come out of the State of Mississippi. A review of this case by the Supreme Court and a reversal of the precedent set by the Court of Appeals regarding the federal permitting system is necessary to the continued vitality and existence of NEPA in the Fifth Circuit. The case offers a clear opportunity for this Court to make a pronouncement concerning the effect of the massive federal permitting program on environmental law and environmental impact statements.

We respectfully and urgently ask this Honorable Court to grant our Petition for Writ of Certiorari.

Respectfully submitted,

SAVE THE BAY, INC.,
PETITIONER

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CERTIFICATE

I, ROBERT W. SMITH, attorney for the Petitioner, do hereby certify that I have this day mailed a copy of the Writ of Certiorari, via U.S. Mail, postage prepaid to:

Chief Appellate Section
Land and Natural Resources Division
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DONE, this the 2nd day of June, 1980.

/s/ Robert W. Smith
ROBERT W. SMITH

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 79-1432

SAVE THE BAY, INC.,
Plaintiff-Appellant,

v.

THE UNITED STATES CORPS OF ENGINEERS, UNITED STATES ARMY, COLONEL DRAKE WILSON, and E.I. DU PONT DE NEMOURS AND COMPANY,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi

Jan. 24, 1980.

Before BROWN, TJOFLAT and GARZA, Circuit Judges.

GARZA, Circuit Judge:

Appellant appeals from refusal of the United States Magistrate, acting on behalf of the District Court by consent of the parties, to require the United States Corps of Engineers to prepare an Environmental Impact Statement (EIS) as provided for under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 *et seq.* Appellants argue the Court below erred in concluding that the environmental assessment by the district engineer was reasonable and based on substantial evidence, that the activity involved was not a major federal action significantly affecting the quality of the human environment, and that the Corps of Engineers was not required to consider the environmental consequences of the entire project but only the effects of the installation

and maintenance of a twenty-four inch outfall pipeline. Appellees argue on appeal that Appellants have no standing to challenge the actions of the Corps of Engineers. For the reasons stated below, we affirm the ruling of the United States Magistrate.

FACTS

At the time this litigation began, the defendant, E.I. Du Pont De Nemours & Co., Inc., proposed to construct and operate a massive titanium dioxide manufacturing facility in Delisle, Mississippi. Pursuant to this plan, Du Pont sought necessary authorization and permits from appropriate state and federal agencies.

On November 21, 1974, Du Pont sought authorization from the defendant, Army Corps of Engineers, to install a twenty-four inch diameter effluent line into the marshlands and Bay of St. Louis. The effluent line would carry approximately two million gallons per day of industrial wastewater and discharge it into the Bay of St. Louis. The line would be approximately 2,200 feet in length extending into the Bay and construction would require removal of 610 cubic yards of dredged material from the Bay.

On February 3, 1975, the Mississippi Air and Water Pollution Control Commission, acting pursuant to authority delegated to it by the Environmental Protection Agency, issued a National Pollutant Discharge Elimination System (NPDES) permit to Du Pont allowing discharge of the wastewater in accordance with the conditions of the permit.

Following solicitation of comments from federal, state and local agencies concerning the proposed pipeline construction permit, the Corps of Engineers announced a public hearing would be held on June 19, 1975, to answer any questions concerning issuing of the pipeline construc-

tion permit. In keeping with the Corps' prior determination that only the construction of the pipeline was subject to their regulation, the public notice for the hearing was limited to the installation of the twenty-four inch diameter pipeline and made no mention of consideration of other aspects of the Du Pont plant in the issuance of its permit. On June 19, 1975 the hearing was held and all proponents and opponents were allowed to express their views. The proponents consisted mostly of governmental or business organizations and generally testified as to the favorable economic impact the plant would have. The opponents, consisting mostly of ecological and recreational organizations, testified generally that a potential danger to marine life existed and that an Environmental Impact Statement was necessary.

On July 17, 1975, Colonel Drake Wilson, District Engineer for the Mobile Corps of Engineers, issued a Statement of Findings assessing the impact the proposed activity would have on the environment. The Corps determined there would be no adverse effect on air quality and that water quality would be only temporarily affected. The findings also noted the issuance of the NPDES permit and that the Environmental Protection Agency had no objection to the issuance of the Corps' permit. The statement, also taking into consideration the determinations of the Mississippi Marine Resources Council and the Gulf Coast Research Laboratory, found there would be no significant adverse effect on land use, visual aesthetics, wildlife, sealife, vegetation, or historical interests. Based on the administrative record, Colonel Wilson directed that the permit be issued. The permit only authorized building the pipeline and was subject to several conditions, one of which required that Du Pont have a proper NPDES permit governing the effluent discharge.

The Plaintiff, Save the Bay, Inc., brought suit pursuant to the National Environmental Policy Act (NEPA)

against the United States Army Corps of Engineers, the United States Army, Colonel Drake Wilson, Mobile District Office of the Corps of Engineers, and Du Pont seeking declaratory and injunctive relief and monetary damages. The case was referred to the United States Magistrate by the District Judge and thereafter the defendant's Motions for Summary Judgment were granted and judgment was entered December 16, 1977 dismissing the complaint with prejudice.

STANDING

Save the Bay's complaint alleges that it is a nonprofit corporation organized under the laws of the State of Mississippi; that its membership is primarily composed of numerous full-time and part-time residents of Harrison and Hancock Counties in the State of Mississippi; and that its members will be adversely affected economically, aesthetically and environmentally.

Appellee Du Pont urges on appeal that Save the Bay has failed to establish standing under § 10 of the Administrative Procedures Act, 5 U.S.C. § 702. Specifically, Du Pont argues that under *Sierra Club* v. *Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972) and *United States* v. *SCRAP*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973), Save the Bay must allege that its members "use" the area and that the proposed federal action will significantly affect their "use". Du Pont's reliance on *Sierra Club* v. *Morton*, *supra*, is misplaced. Here, the Plaintiff has alleged economic, aesthetic and environmental injury to its members and clearly has gone beyond mere general allegations of grievance on behalf of the public interest. Du Pont's argument, that failure to specifically allege "usage" of the geographic area is fatal to Plaintiff's standing, is without merit. An obvious inference of the English language is that residents of a geographical area "use" that geographical

area. An allegation of residence coupled with an allegation of injury caused by federal action affecting the area of that residence clearly demonstrates that the party seeking review is among those injured. We fail to see how the acts of camping, hiking, fishing or sightseeing, in a particular geographic location, held sufficient for standing in *United States* v. *SCRAP*, *supra*, can be considered more relevant for purposes of standing than can the act of residing in a particular geographic location.

REASONABLENESS OF THE CORPS' DECISION

The Court below noted that the standard for review of an agency determination that an Environmental Impact Statement need not be prepared is whether such determination is reasonable. This standard was set forth by this Court in *Save Our Ten Acres* v. *Kreger*, 472 F.2d 463 (5th Cir. 1973). If the determination is reasonable and made objectively and in good faith on a reviewable environmental record, the determination must be upheld. The Court below found that the environmental assessment prepared by the Corps completely and fully addressed the possible environmental consequences, that the assessment was based on substantial evidence, and that Corps complied with appropriate federal statutes and regulations. Appellants contend that the Corps' determination was unreasonable. They argue that the testimony and evidence offered in opposition to the building of the pipeline and plant should compel the conclusion that an EIS is required. The Appellants further argue that the Corps abdicated its responsibilities by failing to conduct independent studies and by considering the evaluations of other governmental agencies concerning the pipeline's potential adverse effects.

We do not agree with Appellant's contentions. Without detailing every point and counter-point of evidence before the Corps, it is clear that the Corps had testimony, evidence and comments from individuals and gov-

ernmental agencies which could lead it to reasonably conclude that an EIS would not be necessary. The Corps received and reviewed comments from several governmental agencies [1] as well as from quasi-governmental and business organizations. With little exception, all comments from governmental agencies indicated there would be no significant adverse impact on the environment. We cannot agree with Appellant that consulting with these agencies was improper. The National Environmental Policy Act, 42 U.S.C. § 4332(2)(C) requires that federal agencies consult with other agencies whose area of expertise is superior to their own. Of course, this should not be understood as allowing the Corps to base their determination solely on the comments of other agencies. Perhaps the most basic requirement of NEPA is that all federal agencies make an *independent* environmental assessment of the proposed action. The Court below correctly recognized this in distinguishing this case from *Mahelona* v. *Hawaiian Electric Company*, 418 F.Supp. 1328 (D. Hawaii 1976) wherein the Corps of Engineers erroneously considered the advisements of the EPA as determinative and consequently failed to independently determine whether or not the proposed action would have a significant impact on the human environment. For these reasons we hold the Corps' decision was not unreasonable.

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[1] Among those agencies were the following: the Environmental Protection Agency, the Department of Interior, Fish and Wildlife Service, the Department of Commerce, the National Oceanic and Atmospheric Administration, the Mississippi Marine Resources Council, the Mississippi Air and Water Pollution Control Commission, and the Mississippi State Clearing House for Federal Programs.

A MAJOR FEDERAL ACTION?

Appellants contend the court below erred in not finding the grant of the pipeline construction permit was a "major Federal action significantly affecting the quality of the human environment", under 42 U.S.C. § 4332(2)(C), and therefore requiring preparation of an EIS. In furtherance of this contention they argue that granting almost any Federal permit to this massive multimillion dollar manufacturing plant should trigger the obligations of NEPA.

The Court below held that the provisions of NEPA must be read in context of other language in the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1251 *et seq.*, which places control of water pollution caused by discharges of effluents in the hands of the states and the EPA. *United States* v. *SCRAP, supra.* The court went on to hold, citing *Sierra Club* v. *Hodel*, 544 F.2d 1036 (9th Cir. 1979) and *Port of Astoria* v. *Hodel*, 8 ERC 1156, aff'd 595 F.2d 467 (9th Cir. 1979), that the issuance of the Corps' permit was not a sufficient nexus between the Corps and construction of the Du Pont plant to make the Corps a partner in such construction and thereby "federalize" the construction of the Du Pont plant. In other words, the granting of the pipeline permit by the Corps was not a "major Federal action" within the meaning of NEPA.

In addition to the Court's holding, it should also be noted that FWPCA, 33 U.S.C. § 1371(c)(1),[2] ordinarily

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[2] 33 U.S.C. § 1371(c)(1) and (2) provides as follows: (c)(1) Except for the provision of Federal financial assistance for the purpose of assisting the construction of publicly owned treatment works as authorized by section 1281 of this title, and the issuance of a permit under section 1342 of this title for the discharge of any pollutant by a new source as defined in section 1316 of this title, no action of the Adminis-

prohibits the issuance of a NPDES permit from being deemed a major Federal action significantly affecting the quality of the human environment within the meaning of NEPA. Furthermore, § (c) (2) prohibits Federal agencies, under guidance of NEPA, from reviewing any effluent limitation under a NPDES permit or from imposing any effluent limitation as a condition precedent to issuance of a license.

The decision of the Court below in no way held that the Corps was precluded from preparing an EIS because of FWPCA, but instead held that the Corps' determination, of whether or not issuance of the construction permit was a "major Federal action", was limited to construction and operation of the pipeline itself and correctly held that the environmental consequences of the effluent was a factor to be excluded from their consideration.

In reaching our conclusion on this point we are not unmindful of the impact that building of this massive manufacturing plant will have on the people of Harrison

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trator taken pursuant to this chapter shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969 (83 Stat. 852); and (2) Nothing in the National Environmental Policy Act of 1969 (83 Stat. 852) shall be deemed to—

> (A) authorize any Federal agency authorized to license or permit the conduct of any activity which may result in the discharge of a pollutant into the navigable waters to review any effluent limitation or other requirement established pursuant to this chapter or the adequacy of any certification under section 1341 of this title, or
>
> (B) authorize any such agency to impose, as a condition precedent to the issuance of any license or permit, any effluent limitation other than any such limitation established pursuant to this chapter.

and Hancock Counties, but the requirements of NEPA do not reach private acts—only "major Federal actions." We fail to see how granting of the pipeline construction permit, after issuance of a valid NPDES permit, can be considered a major Federal action. An examination of the guidelines issued by the Council on Environmental Quality, 40 C.F.R. 1500.6(c), indicates that a private project does not become a "major Federal action" merely because of some incidental federal involvement. In this case, the pipeline itself was not a necessity for operation of the plant. At least one alternative method of discharge, not requiring any Corps permit, was available to Du Pont. We are not saying that the requisite Federal action must be a condition precedent to private action in order for preparation of an EIS to be required. But we do hold that in order for there to exist "major Federal action" some greater involvement, than is present in the case at hand, must exist.

THE PIPELINE OR THE WHOLE PLANT?

Appellant's most vigorously argued point on appeal and perhaps the point which would control the outcome of this case contests the Corps looking only to the environmental consequences of the pipeline construction and maintenance instead of considering the entire Du Pont project in its decision on whether or not to prepare an EIS.[3] Appellants assert that narrowing the scope of inquiry to the pipeline construction alone is the "blinder" approach which should be rejected by this Court. By analogy they compare the Du Pont facility to a living organism which at one end eats chlorine gas and at the other end excretes hydrocloric acid, iron, chromium, zinc, and other nastiness to the tune of 2,000,000 gallons per day. Their argument is that but for the permit there

[3] We express no opinion as to the proper scope and extent of coverage of an EIS should one have been necessary.

would be no pipeline; without the pipeline there would be no excretion; without the ability to excrete the plant would suffocate in its own waste. They argue that the permit "enables" the plant to exist and therefore the entire plant should be taken into consideration in whether or not the pipeline construction permit should be issued. In support of this "Enablement Theory", appellants cite *Port of Astoria* v. *Hodel, supra, Mahelona* v. *Hawaiian Electric Company, Inc., supra,* and *Citizens for Clean Air, Inc. et al.* v. *United States Army Corps of Engineers et al.*, 349 F.Supp. 696 (S.D.N.Y.1972).

Upon review of these cases, this Court does not disagree with their reasoning but the circumstances of those cases are clearly distinguishable from those before us. The case of *Citizens for Clean Air* preceded the FWPCA Amendments of 1972 and therefore is no longer supportive of the proposition advanced here. In *Port of Astoria* there existed a long-term contractual relationship between a Federal agency and a private corporation in which the proposed private manufacturing plant was entirely dependent upon electrical power to be supplied by the Federal agency. In *Mahelona* the problem was not that the Corps failed to examine the effects of the electrical generating plant, but rather failed to review the consequences of its own construction permit allowing a wastewater discharge facility. In short, the results of these cases do not compel the conclusion which the Appellants desire. Absent facts or circumstances which are not present here, we decline to hold that NEPA required the Corps as a matter of law to consider the entire Du Pont facility in determining whether or not an EIS was necessary.

AFFIRMED.

80-171

No.

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SAVE THE BAY, INC.,

Petitioner,

v.

U.S. CORPS OF ENGINEERS, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONSE AND BRIEF IN OPPOSITION FOR RESPONDENT, E. I. DU PONT DE NEMOURS AND COMPANY

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TABLE OF CONTENTS

	Page
THE OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
COUNTERSTATEMENT OF THE CASE	4
SUMMARY OF THE ARGUMENT	9
REASONS FOR DENYING THE WRIT	10
I. THE COURT OF APPEALS CORRECTLY AFFIRMED THE FINDING OF THE UNITED STATES DISTRICT COURT THAT THE CORPS OF ENGINEERS ON THE BASIS OF AN ENVIRONMENTAL ASSESSMENT CONDUCTED PURSUANT TO ITS REGULATIONS PROMULGATED TO IMPLEMENT ITS RESPONSIBILITIES UNDER NEPA ACTED REASONABLY AND OBJECTIVELY ON A REVIEWABLE ENVIRONMENTAL RECORD IN ISSUING AN EFFLUENT OUTFALL LINE CONSTRUCTION PERMIT	10
II. THE COURT OF APPEALS PROPERLY DETERMINED THAT NEPA DOES NOT IMPOSE UPON THE CORPS OF ENGINEERS THE OBLIGATION TO PREPARE AN EIS WHERE A NPDES PERMIT HAS BEEN ISSUED UNDER THE FWPCA	14
III. THE COURT OF APPEALS PROPERLY DETERMINED THAT THE CORPS' ISSUANCE OF A DREDGE AND FILL PERMIT FOR THE CONSTRUCTION OF AN OUTFALL LINE, WHICH IS INCIDENTAL AND NONESSENTIAL TO RESPONDENT'S PRIVATE ACTIVITIES, DID NOT CONSTITUTE A MAJOR FEDERAL ACTION SIGNIFICANTLY AFFECTING THE QUALITY OF THE HUMAN ENVIRONMENT.	17
IV. THE ISSUES PRESENTED ON THE PETITION FOR CERTIORARI HAVE BEEN RENDERED MOOT BY VIRTUE OF THE FACT THAT CONSTRUCTION OF THE OUTFALL LINE WAS COMPLETED IN 1978 AND THE DU PONT PLANT HAS BEEN IN OPERATION SINCE AUGUST OF 1979.	21
CONCLUSION	22
CERTIFICATE OF SERVICE	23
APPENDIX	1a
○ Opinion Below	

TABLE OF AUTHORITIES

CASES:	Page
Atlanta Coalition, Etc. v. *Atlanta Regional Commission*, 599 F.2d 1333 (5th Cir. 1979)	19
Biderman v. *Morton*, 497 F.2d 1141 (2nd Cir. 1974)	20
Citizens for Clean Air, Inc. v. *U.S. Corps of Engineers, et al.*, 349 F. Supp. 696 (S.D. N.Y. 1972)	18
Citizens to Preserve Overton Park v. *Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971)	13
Davis v. *Coleman*, 521 F.2d 661 (9th Cir. 1975)	13
Florida Wildlife Federation v. *Goldschmidt*, 611 F.2d 547 (5th Cir. 1980)	8
Gage v. *United States Atomic Energy Comm.*, 479 F.2d 1214 (D.C. Cir. 1973)	20
Kings County Economic Dev. Ass'n. v. *Hardin*, 478 F.2d 478 (9th Cir. 1973)	20
Mahelona v. *Hawaiian Electric Co., Inc.*, 418 F.Supp. 1328 (D. Ha. 1976)	16, 19
Minnesota Public Interest Group v. *Butz*, 498 F.2d 1314 (8th Cir. 1973)	13
New England Coalition v. *U.S. Nuclear, Etc.*, 582 F.2d 87 (1st Cir. 1978)	16
Port of Astoria v. *Hodel*, 595 F.2d 467 (9th Cir. 1979)	19
Save our Ten Acres v. *Kreger*, 472 F.2d 463 (5th Cir. 1973)	13
Save the Bay, Inc., et. al. v. *Mississippi Air and Water Pollution Control Commission*, 341 So.2d 98 (Miss. 1976)	5
Save the Bay v. *Mississippi Air and Water Pollution Control Commission, Environmental Protection Agency, Douglas M. Costle, Administrator of the EPA, and the United States of America*, (S.D. Miss., Civil No. 577-0240-(N), decided August 20, 1977)	6
Save the Bay v. *Mississippi Air and Water Pollution Control Commission, et. al.*, (5th Cir., No. 77-3214)	6
Save the Bay v. *Train*, 556 F.2d 1282 (5th Cir. 1977)	5

Table of Authorities Continued

	Page
Strycker's Bay Neighborhood Council v. *Karlen*, 444 U.S. 223, 100 S.Ct. 497; 62 L.Ed.2d 433 (1980)	13
Vermont Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978)	14
Wyoming Outdoor Coordinating Council v. *Butz*, 484 F.2d 1244 (10th Cir. 1973)	13
STATUTES:	
Rivers and Harbors Appropriation Act of 1899 33 U.S.C. 401	1
Federal Water Pollution Control Act	
33 U.S.C. 1251-1376	1, 5
33 U.S.C. 1371 (c) (1)—(2)	8
33 U.S.C. 1371(c) (2) (A)—(B)	3, 15
National Environmental Policy Act of 1969	
42 U.S.C. §4321 *et seq.*	2
42 U.S.C. §4332(2) (c)	3, 8, 10, 11
REGULATIONS:	
33 C.F.R. 209.410 *et seq.*	11
33 C.F.R. 209.410 (d) (2) (ii)	11
40 C.F.R. 1500.6	18
MISCELLANEOUS:	
Legislative History of the Water Pollution Control Act Amendments of 1972, 93d Cong. 1st Sess. at p. 239	16

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---

RESPONDENT, E. I. DU PONT DE NEMOURS AND COMPANY BRIEF IN OPPOSITION

The Respondent, E. I. du Pont de Nemours and Company (Du Pont), respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at *610* F. 2d *322*.

OPINION BELOW

The United States Court of Appeals for the Fifth Circuit affirmed the judgment of the United States District Court for Southern Mississippi, which granted summary judgment to Defendants (Respondents) on Plaintiff's (Petitioner's) request for (1) an injunction against construction of a pipeline permitted by the U.S. Corps of Engineers under 33 USC 401 and 33 USC 1251, and (2) a declaratory judgment that

the Corps prepare an environmental impact statement (EIS).

JURISDICTION

The opinion affirming the trial court's judgment was rendered January 24, 1980. Petition for Rehearing was denied March 17, 1980. Stay of the Mandate pending this review was entered April 16, 1980. Jurisdiction of this Court rests on 28 USC 1254.

QUESTIONS PRESENTED

1. Whether the Circuit Court of Appeals was correct in affirming the finding of the U.S. District Court that the U.S. Corps of Engineers (Corps), on the basis of an environmental assessment conducted pursuant to its regulations promulgated to implement its responsibilities under the National Environmental Policy Act of 1969, 42 USC §4321 *et seq.* (NEPA), acted reasonably and objectively on a reviewable environmental record in issuing an effluent outfall line construction permit?

2. Whether NEPA imposes upon a federal agency the obligation to prepare an EIS on the effects of an effluent discharge permitted under a National Pollutant Discharge Elimination System (NPDES) permit issued under the Federal Water Pollution Control Act (FWPCA)?

3. Whether the Court of Appeals correctly determined that issuance of a dredge and fill permit for the construction of an outfall line did not constitute a major federal action significantly affecting the quality of the human environment since respondent's private activities were incidentally and unessentially related to the permit to construct?

4. Whether the issue of the construction and use of the outfall line is now moot since construction was completed in

1978 and the plant has been in operation since August of 1979?

STATUTES INVOLVED

42 USC 4332(2)(c)

"The Congress authorizes and directs that to the fullest extent possible . . .

All agencies of the Federal Government shall:

(c) Include in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment a detailed statement (EIS) by the responsible official on:

(i) The environmental impact of the proposed action,

(ii) Any adverse and environmental effects which cannot be avoided should the proposal be implemented,

(iii) Alternatives to the proposed action,

(iv) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. . . ."

33 USC 1371(c)(2)

"Nothing in the National Environmental Policy Act of 1969 shall be deemed to—

(A) authorize any Federal agency authorized to license or permit the conduct of any activity which may result in the discharge of a pollutant into the navigable waters to review any effluent limitation or other requirement established pursuant to this Act or the adequacy of any certification under section 401 of this Act; or

(B) authorize any such agency to impose, as a condition precedent to the issuance of any license or permit, any effluent limitation other than any such limitation pursuant to this Act."

COUNTERSTATEMENT OF THE CASE

This case involves the construction of an outfall line from a Du Pont titanium dioxide manufacturing plant to Bay of St. Louis. To construct the outfall line, Du Pont first had to obtain a permit from the Corps. In order to discharge treated effluent through the outfall line, it was required to obtain an NPDES permit pursuant to the FWPCA.

In 1975 Du Pont began construction of its plant at De Lisle, Mississippi. It was completed in the summer of 1979 and has been in operation since August 1979. Pursuant to public notice, and in most instances after public hearing, Du Pont obtained permits or approvals from state and federal agencies associated with construction and operation of the plant. Various aspects of the plant's impact on the environment were considered and environmental control measures approved including:

- control and quality of treated water effluent approved by the Mississippi Air and Water Pollution Control Commission (MAWPCC) and the Environmental Protection Agency (EPA).
- control of air emissions by MAWPCC.
- control of solid waste by the Mississippi State Department of Health.
- control of the impact on wetlands by the Mississippi Marine Resources Council.
- permission to drill a disposal deep well by the Mississippi Oil and Gas Board.
- control of effluent disposed of into the deep well by MAWPCC.

- permission to install an effluent outfall line into navigable waters by the U.S. Corps of Engineers.

It is this last permit that provides the basis for this lawsuit.[1] Du Pont applied for the permit here in question on November 21, 1974. It sought permission to install an outfall line over a short distance of marshland and approximately 2,200 feet into the Bay of St. Louis via a ditch in the bottom of the bay.

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[1] In several separate but related cases, Petitioner has endeavored to stop the effluent discharge authorized by the NPDES permit and the construction and operation of a railroad line servicing the plant. This litigation provides a background against which this Petition should be examined.

In *Save the Bay* v. *Administrator of the Environmental Protection Agency*, 556 F.2d 1282 (5th Cir., 1977), Save the Bay (STB), in an original proceeding in the Court of Appeals, attacked the NPDES permit by challenging the EPA's designation authority pursuant to the FWPCA, 33 USC §1251-1376. In particular, STB charged that the EPA acted improperly by failing to revoke Mississippi's state NPDES permit. Briefly stated, that Court held that STB must first exhaust its administrative remedies before review was available in federal courts of appeals as to whether EPA improperly failed to revoke Mississippi's state NPDES permit program. In addition, the Court found that jurisdiction over EPA's failure to veto an NPDES permit was only proper in federal district court and that in reviewing veto cases the district court may only examine (1) whether the permit contains a violation of federal guidelines the agency has failed to consider, and (2) whether unlawful factors have tainted the agency's exercise of discretion.

In *Save the Bay, Inc., et al.*, v. *Mississippi Air and Water Pollution Control Commission*, 341 So.2d 98 (Miss. 1976), STB was successful in establishing its right to a hearing to challenge the MAWPCC permits. In accordance with that holding, the Mississippi Supreme Court remanded the case for further proceedings, which were held in the summer and fall of 1977. At these hearings, STB presented evidence concerning the effluent discharge. Based on a review of this evidence, the MAWPCC, on December 13, 1977, revised its original NPDES permit to incorporate a number of STB's suggestions. STB's petition to review the revised permit in Mississippi Chancery Court, Harrison County, No. 71954, was dismissed with prejudice on July 17, 1978.

The application was processed in accordance with the Corps' regulations, particularly those regulations promulgated to implement the Corps' NEPA responsibilities. The Corps solicited comments from federal and state agencies and from the public. A public hearing was held on June 19, 1975, and an official transcript of all comments, written and oral, was prepared. No agency expressed any concern over environmental impact, and several expressed the view that there would be no significant impact. Various public groups and private citizens commented in support of the proposed action or in opposition to it.

Those who opposed, including the Petitioners, directed their concern not to the outfall line but to the effluent that would flow through it and be discharged into the Bay.

In *Save the Bay* v. *Mississippi Air and Water Pollution Control Commission, Environmental Protection Agency, Douglas M. Costle, Administrator of the EPA and the United States of America* (S.D. Miss; Civil No. S77-0240-(N), decided August 20, 1977), STB sought, among other things: (1) cancellation of the MAWPCC hearings being conducted pursuant to the Mississippi Supreme Court order, (2) an injunction directing the MAWPCC to enjoin Du Pont from further construction on the plant, (3) cancellation of MAWPCC's permits, (4) designation of EPA as the appropriate agent to conduct further hearings, (5) preparation of an EIS by the EPA, (6) a declaratory judgment on the issues raised in the pleadings, (7) a writ of mandamus ordering EPA to withdraw MAWPCC's authority, and (8) a prayer for monetary relief. On August 20, 1977, all of these claims were dismissed. In relevant part the district court held (1) that EPA had no authority to cancel the permits, (2) that there was no authority to halt construction on the plant, and (3) that EPA did not have to prepare an impact statement, because the NPDES permit was issued under State authority and further because EPA is exempt from preparing impact statements under Section 511(a) of the FWPCA, 33 USC 1371(a). [Because regulations have not been promulgated for titanium dioxide it is not considered a new point source, triggering the necessity for an EIS.] STB's appeal in that case was dismissed by the Fifth Circuit on June 22, 1978, for lack of prosecution. *Save the Bay* v. *Mississippi Air and Water Pollution Control Commission et al.* (5th Cir. No. 77-3214).

On July 17, 1975, the Corps issued a detailed environmental assessment. It determined that the permitted activity would have no significant impact on the environment and deferred to the EPA and MAWPCC authorities' expertise regarding the quality of effluent to be discharged and the conclusions of those agencies that the quality controls imposed by the NPDES discharge permit guaranteed no adverse impact on the water quality of Bay of St. Louis.

On August 26, 1975 the permit issued. The permit authorized construction of the outfall line. The permit contained a condition that it *did not authorize* any discharge via the pipeline to the Bay of St. Louis. Thus, such discharge was to be controlled by NPDES permit as required by the appropriate permitting agency, in this case MAWPCC.

One year after the permit issued, on August 5, 1976, Petitioners brought this suit against the Corps and Du Pont in the U.S. District Court for Southern Mississippi. Petitioners charged the Corps with violating several federal laws and asked that Du Pont be enjoined from constructing the line. The court dismissed several of Petitioners' claims, none of which are at issue here. Ultimately, the questions before the court were (a) did the Corps violate NEPA in failing to prepare an EIS, (b) should outfall line construction be enjoined until an EIS was prepared, and (c) should a preliminary injunction against construction issue pending final judgment?

Though plant construction was under way, Du Pont stipulated it would not commence construction of the outfall line until the court ruled on the merits.

On December 9, 1977, the magistrate granted summary judgment in favor of the Corps and Du Pont. Petitioners appealed *but sought no injunction against outfall line*

construction pending appeal in either the trial or appellate court, though it knew Du Pont was proceeding.[2]

In early 1978 STB appealed only to have the appeal dismissed on the technical ground that final judgment must be entered by the judge—not his magistrate.

Upon execution of judgment by the judge, Petitioners again appealed to the Fifth Circuit but still failed to request interlocutory relief pending review.

In January 1980 the Fifth Circuit affirmed. The court rejected the appellant's contention that the Corps' determination was unreasonable, citing *Save Our Ten Acres* v. *Kreger,* 472 F.2d 463 (5th Cir. 1973), noting that it was clear that the Corps had testimony, evidence and comments from individuals and governmental agencies which could lead it to reasonably conclude that an EIS would not be necessary. Moreover, the court rejected the appellant's contention that the grant of the outfall line construction permit constituted a "major federal action significantly affecting the quality of the human environment" under 42 USC §4332(2)(c) which would have required the preparation of an EIS. Acknowledging that the FWPCA, 33 USC §1371(c)(1) prohibits the issuance of an NPDES permit from being deemed a major federal action within the meaning of NEPA and that §102(2)(c) of that Act prohibits federal agencies, under

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[2] Petitioner's continued prosecution of the instant matter in light of the failure to seek a stay against the pipeline construction is highly incongruous. The clear purpose of the lawsuit was to require the United States Corps of Engineers to prepare an EIS prior to the construction and operation of the Du Pont plant. Petitioner is fully aware that said plant has been fully constructed and in operation since August of 1979. Petitioner's failure to take any interlocutory action in an attempt to halt construction during the pendency of the appeal renders the issues sought to be raised herein as moot and the appeal should be dismissed on that ground. *Florida Wildlife Federation* v. *Goldschmidt,* 611 F.2d 547 (5th Cir. 1980).

guidance of NEPA, from reviewing any effluent limitation as a condition precedent to the issuance of a license, the court was unable to see how the granting of the outfall line construction permit, after issuance of a valid NPDES permit, could be considered a major federal action. The court further examined and relied upon guidelines issued by the Council on Environmental Quality which underscore the proposition that a private project does not become a major federal action because of some incidental federal involvement. It thereupon concluded, on the unique and peculiar facts of this case, that some greater involvement than is present herein must be present in order for there to exist major federal action.

SUMMARY OF THE ARGUMENT

The case at bar involves a local action which has no significant impact upon the environment. Appellant's unsupported allegations concerning the massive environmental impact of the Du Pont plant are in stark contrast to the record of this matter which reveals the uniformly positive support and clearance it has obtained from appropriate state and federal environmental agencies. Construction of the effluent outfall line from the plant to Bay of St. Louis was approved only after a detailed environmental assessment by the Corps pursuant to its regulations promulgated to implement NEPA.

In deciding the case, the Fifth Circuit reviewed the voluminous administrative record below and relied upon factual bases for its decision. Its resolution of the issues herein is fully consistent with existing statutory and case law and sets forth no novel legal theories.

The opinion of the lower court correctly notes that the Corps of Engineers properly complied with the applicable procedural requirements set forth in NEPA by performing an environmental assessment before determining that this action, i.e., issuing the permit, did not constitute a "major

federal action" significantly affecting the quality of the human environment and therefore did not require the preparation of an EIS.

Furthermore, the Fifth Circuit's decision in the case at bar appropriately recognized the clearly established mandate of the FWPCA that the issuance of a NPDES permit may not be deemed a "major federal action" and its further expression that federal agencies (under guidance of NEPA) may not review any effluent limitation under a NPDES permit or impose any effluent limitation as a condition precedent to the issuance of a license.

Additionally, the Fifth Circuit found that the lower court properly determined on the unique factual record of the case at bar that incidental and unessential federal involvement in a private project does not "federalize" the action so as to necessitate the preparation of an EIS.

Ultimate completion of the construction of the outfall line and commencement of plant operations in August of 1979 viewed in light of the appellant's failure to seek a stay of the District Court judgment renders this petition moot and not appropriate for consideration herein.

REASONS FOR DENYING THE WRIT

I. The Court Of Appeals Correctly Affirmed The Finding Of The United States District Court That The Corps Of Engineers On The Basis Of An Environmental Assessment Conducted Pursuant To Its Regulations Promulgated To Implement Its Responsibilities Under NEPA Acted Reasonably And Objectively On A Reviewable Environmental Record In Issuing An Effluent Outfall Line Construction Permit.

Pursuant to the mandate of NEPA and as expressed in §102(2)(c) of that Act, 42 USC §4332(2)(c), a federal agency has the duty to prepare a detailed EIS in every ma-

jor federal action significantly affecting the quality of the human environment.

In order to determine which of its actions as a federal agency triggers the provisions of §102(2)(c), the Corps promulgated regulations implementing NEPA. These regulations, 33 CFR 209.410 *et seq.*, require the District Engineer to make an environmental assessment about a project before either granting a regulatory permit or withholding it pending preparation of the EIS. They further require the District Engineer to consider comments received from other federal agencies as well as state and local agencies and the public. Consequently, the Corps is able to make an informed threshold decision on the applicability of NEPA's mandate.

In the case at bar, it is clear that the Corps meticulously complied with every detail of its statutory and regulatory responsibilities by issuing a detailed environmental assessment pursuant to 33 CFR 209.410(d)(2)(ii). It determined that the permitted activity would have no significant impact upon the environment and deferred to the EPA and MAWPCC authorities' expertise regarding the quality of the effluent to be discharged and the conclusions of those agencies that the quality controls imposed by the NPDES discharge permit guaranteed no adverse impact on the water quality of Bay of St. Louis. While there is little doubt that NEPA establishes a clear mandate to all federal agencies to give careful and informed consideration to environmental values in their decision-making process, the record of this case clearly reveals a wide ranging, good faith assessment by the Corps of Engineers of the potential environmental impact of its action. The Corps issued a public notice of the instant permit application, seeking the input of the appropriate federal, state and local agencies, numerous environmental groups, various interested universities, business groups, private organizations and individuals. Among

the groups included in this dissemination were: the Environmental Protection Agency, the Fish and Wildlife Service, the National Oceanic and Atmospheric Administration, Mississippi's Marine Resources Council and Air and Water Pollution Control Commission, Mississippi's State Clearinghouse for Federal Programs, the Mobile Wildlife Conservation Center, the Sierra Club and approximately 110 other groups, agencies and individuals.

The response from appropriate state and federal agencies was unanimously positive. The EPA informed the Corps that it had no objections to the issuance of the Du Pont permit. The Fish and Wildlife Service stated that the proposed project would have no adverse effect on fish and wildlife resources and expressed no objection to the issuance of the permit. The Mississippi Marine Resources Council notified the Corps that the project would have no significant adverse impact on coastal wetlands, and the Mississippi State Clearinghouse for Federal Programs informed the Corps that the action was consistent with present state goals and policies. Only the National Marine Fisheries Service, in a form response, failed to grant unqualified approval of the project, based upon the fact that it had not been able to investigate the plan. In fact, no federal, state or local agency with expertise on these matters expressed any objection to the instant project.

In order to collect additional data for its determination of whether the project constituted a major federal action, the Corps conducted a public hearing at which time opponents and proponents of the project were given the opportunity to express their views. Only after an exhaustive review of the extensive administrative record, a detailed examination of five different environmental criteria, the comments of various groups and individuals, did the District Engineer issue the permit to dredge and fill. It is important to note that this

is not a case where important aspects of environmental impact were not considered. Quite the contrary, the activity permitted by the Corps received exhaustive review after which the Corps concluded that there would be no permanent or significant adverse environmental effects.

The Fifth Circuit correctly determined that the standard for review of an agency determination that an EIS need not be prepared is whether such determination is reasonable, made objectively and in good faith on a reviewable environmental record.[3] *Save Our Ten Acres* v. *Kreger, supra.* See also *Davis* v. *Coleman,* 521 F.2d 661 (9th Cir. 1975); *Minnesota Public Interest Group* v. *Butz,* 498 F.2d 1314 (8th Cir. 1973); *Wyoming Outdoor Coordinating Council* v. *Butz,* 484 F.2d 1244 (10th Cir. 1973).

Rejecting the Appellant's contentions that the Corps' determination was unreasonable, the Fifth Circuit recounted the extensive evidence before the Corps and the Corps' independent environmental assessment of the proposed action and held that the Corps had testimony, evidence and comments from individuals and governmental agencies which could lead it to reasonably conclude that an EIS was not necessary. This rule of reason approach is fully consistent with the guidelines for review which have been set forth by this Court in *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 416, 91 S.Ct. 814, 828, 28 L.Ed. 2d 136, 153 (1971). Most recently, in *Strycker's Bay Neighborhood Council* v. *Karlen,* 444 U.S. 223, 100 S.Ct. 497, 500, 62 L.Ed. 2d 433, 437-438 (1980), this Court has reemphasized the fact that while NEPA has established significant substantive

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[3] Petitioner readily concedes that the standard applied by the Fifth Circuit is legally appropriate. They nevertheless seek, using the improper vehicle of a Petition for Certiorari, to have this Court review a factual determination which has previously undergone extensive administrative and judicial scrutiny.

goals for the nation, it imposes upon agencies duties that are *essentially procedural* and that once an agency has made a decision subject to NEPA's procedural requirements, the only role for the Court is to insure that the agency has considered the environmental consequences. In short, it should not interject itself within the area of discretion of the executive as to the choice of action to be taken. See also *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 554-555, 98 S.Ct. 1197, 1217, 55 L.Ed. 2d 460, 486 (1978).

Finally, it is evident that what the petitioners seek in the instant writ—further review of the reasonableness of the Corps' determination constitutes yet another *factual review* of a matter which has previously undergone extensive administrative inquiry in addition to two levels of judicial investigation. The voluminous factual record upon which the Corps made its determination has been exhaustively reviewed. It is respectfully submitted that such application falls outside the purview of those matters reviewable within the context of a Writ of Certiorari and should consequently be denied.

II. The Court Of Appeals Properly Determined That NEPA Does Not Impose Upon The Corps Of Engineers The Obligation To Prepare An EIS Where A NPDES Permit Has Been Issued Under The FWPCA.

The Fifth Circuit's decision affirming the Corps' determination limiting its review to construction and operation of the outfall line and excluding the environmental consequences of the effluent discharged therefrom was premised upon the interrelationship between NEPA and the FWPCA. More particularly, the Fifth Circuit decision is consistent with the clearly established FWPCA mandates that the issuance of a NPDES permit may not be deemed a "major fed

eral action" and that Federal agencies (under guidance of NEPA) may not review any effluent limitation.

Section 511(c)(2)(A)-(B) of the Federal Water Pollution Control Act, 33 USC 1371(c)(2)(A)-(B), expressly states that NEPA may not be used by a Federal agency as a basis to review any effluent limitation established pursuant to the FWPCA or impose any effluent limitation in connection with any permit or license other than such limitation established pursuant to the FWPCA. Moreover, the Act expressly acknowledges that no action taken by the Administrator pursuant to this Act shall be deemed a major Federal action significantly affecting the quality of the human environment. That section provides, in pertinent part, that:

> (c)(1)
>
> "[n]o action of the Administrator taken pursuant to this chapter shall be deemed a major Federal action so affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969; and
>
> (c)(2)
>
> "Nothing in the National Environmental Policy Act of 1969 shall be deemed to
>
> "(A) authorize any Federal agency authorized to license or permit the conduct of any activity which may result in the discharge of a pollutant into the navigable waters to review any effluent limitation or other requirement established pursuant to this chapter. . .or
>
> "(B) authorize any such agency to impose, as a condition precedent to the issuance of any license or permit, any effluent limitation other than any such limitation established pursuant to this chapter."

The legislative history of this section clearly reveals the Congressional intent that NEPA not be used to impose stricter limitations than those imposed by the State or EPA NPDES permit:

> "[n]othing in the National Environmental Policy Act may be construed as the basis for the establishment by other Federal agencies of more stringent controls on the discharge of pollutants other than those provided under this Act nor are such agencies authorized to review or alter effluent limitations issued under this Act."

Legislative History of the Water Pollution Control Act Amendments of 1972, 93d Cong. 1st Sess. at p. 239

This position has received broad judicial approval among the circuits. In *New England Coalition* v. *U.S. Nuclear, Etc.*, 582 F.2d 87 (1st Cir. 1978), the First Circuit has specifically determined that under Section 511(c)(2)(A) the Nuclear Regulatory Commission, in fulfilling its NEPA obligation, was not required to make an independent inquiry into the EPA's findings on the effect the Seabrook nuclear plant would have on the aquatic environment. To that effect, the court noted:

> "The NRC argues, and we agree, that it can properly limit its concern to deciding whether permits should be issued given the aquatic impact as determined by the EPA." *Id* at 98.

And in *Mahelona* v. *Hawaiian Electric Co., Inc.*, 418 F. Supp. 1328, 1336 (D.Ha. 1976), a case upon which Appellant has placed heavy reliance, the same result was reached when the court noted that to conform with the FWPCA, an EIS *may not reassess the water quality considerations* which had already been addressed by EPA. *Mahelona, supra* at 1336.

It is therefore clear that the court's determination that the instant project did not constitute a "major federal ac-

tion" was premised upon its proper analysis of the interrelationship between the FWPCA and NEPA. The Fifth Circuit's determination that the Corps properly limited the scope of its environmental assessment on water quality to the environmental consequences which would result from the construction and operation of the outfall line and that the environmental consequences of the effluent was a factor to be excluded from their consideration was fully consistent with the express mandate of the FWPCA. The FWPCA precludes the very type of duplicative review by federal agencies which Petitioner seeks herein. Appellant's assertions to the contrary, the environmental consequences which may be associated with the effluent *have received and will continue to receive* extensive environmental scrutiny by the State of Mississippi upon whom the NPDES responsibility on water quality has been duly conferred, and by the EPA.

III. The Court Of Appeals Properly Determined That The Corps' Issuance Of A Dredge And Fill Permit For The Construction Of An Outfall Line, Which Is Incidental And Nonessential To Respondent's Private Activities, Did Not Constitute A Major Federal Action Significantly Affecting The Quality Of The Human Environment.

The STB decision represents another in a long line of NEPA determinations with respect to an evaluation of the question of whether a particular project constitutes a major federal action significantly affecting the quality of the human environment. In reaching its determination herein, the Court of Appeals simply applied the facts of the case at bar to the applicable NEPA law. The court's determination emphasized and relied upon the guidelines issued by the CEQ which suggest that a private project does not become a "major federal action" merely because of some incidental federal involvement. Furthermore, the Fifth Circuit carefully examined the protracted factual record of this matter and, based upon the particular facts established herein, properly

determined that Appellant failed to establish a sufficient nexus between the Corps' permit and the construction of the entire Du Pont plant so as to "federalize" the project. The soundness of this determination is evident.

Under the guidelines issued by the Council on Environmental Quality, 40 CFR 1500.6(c), an agency need only prepare an impact statement on an otherwise private action when the agency has control over the "action-causing" impact. Those guidelines state that:

> The identification of major actions significantly affecting the environment is the responsibility of each federal agency, to be carried against the background of its own particular operations. The action must be (1) "major" action, (2) which is a "Federal" action, (3) which has a "significant" effect, and (4) which involves the "quality of the human environment". The words "major" and "significantly" are intended to imply thresholds of importance and impact that must be met before a statement is required. *The action causing the impact must also be one where there is sufficient Federal control and responsibility to constitute Federal action.* 40 CFR 1500.6(c) (emphasis supplied)

Appellant's contentions notwithstanding, a private project does not automatically become a "major federal action" merely on the basis of some tangential federal involvement.

The Court of Appeals carefully reviewed the cases relied upon by STB in support of its position that the issuance of the outfall permit by the Corps somehow served to "federalize" the project. The Court's rejection of appellant's argument was not premised upon its disagreement with the general principles set forth in those cases, but rather upon a determination that the facts in those cases were clearly distinguishable from the case before it. Since the case of *Citizen's for Clean Air, Inc.* v. *U.S. Corps of Engineers et al.*, 349 F.Supp. 696 (S.D. N.Y. 1972) preceded the FWPCA

amendments of 1972, the court correctly noted that the decision was no longer supportive of the proposition advanced by STB. With respect to *Port of Astoria* v. *Hodel*, 595 F.2d 467 (9th Cir. 1979), the court contrasted the incidental federal involvement of the case at bar with the long term contractual relationship between a federal agency and a private corporation in which the proposed private manufacturing plant was entirely dependent upon electrical power to be supplied by the federal agency. Finally, the court correctly observed appellant's misplaced reliance upon *Mahelona* v. *Hawaiian Electric Co., Inc., supra*, where the problem was not that the Corps failed to examine the effects of the electrical generating plant, but rather failed to review the environmental consequences of the very activity the Corps permitted, i.e., a wastewater discharge facility.

A recent case arising out of the Fifth Circuit contains a well reasoned discussion of the interrelationship between private and federal action. In *Atlanta Coalition, Etc.* v. *Atlanta Regional Comm'n*, 599 F.2d 1333 (5th Cir. 1979), the court, commenting upon the relationship between the United States Department of Transportation's planning responsibilities and Atlanta's local regional development plan within the context of the applicability of NEPA to private action, observed that while it would not quarrel with the proposition that in some circumstances, "federal involvement [could be] *so massive, so pervasive* that the acts of the state are in reality federal actions," the mere funding of a particular development program by the federal agency fell far short of the requisite involvement to "federalize" the activity. *Atlanta Coalition, Etc., supra*, at p. 1346 (emphasis supplied).

The Court of Appeals' determination that the grant of an outfall line construction permit, after issuance of a valid NPDES permit, did not constitute sufficient involvement to

be characterized as "major federal action" was entirely appropriate. That decision was a narrow one and based entirely on the unique factual circumstances set forth in this record which clearly reveal the *de minimis* environmental impact associated with the construction and operation of the outfall line.

Moreover, appellant's suggestion that a private project automatically becomes a major federal action merely because of some tangential federal involvement loses much of its force in light of the fact that the requisite federal action is only present when federal approval is a necessary condition precedent without which the private action could not take place. *Biderman* v. *Morton*, 497 F.2d 1141, 1147-1148 (2nd Cir. 1974). See also *Kings County Economic Dev. Ass'n.* v. *Hardin*, 478 F.2d 478, 480-481 (9th Cir. 1973); *Gage* v. *United States Atomic Energy Comm.*, 479 F.2d 1214, 1220 (D.C. Cir. 1973). The Fifth Circuit has correctly noted that utilization of the outfall structure was never a condition precedent to the plant's operation and that at least two alternative waste disposal techniques were available. One alternative method involved deep well injection and the other would have resulted in discharge into the natural nonnavigable drainage swale and then into the Bay of St. Louis. Since neither of these options would have required a permit from the Corps, the requisite nexus between the federal agency and the private action is missing.

In sum, it is evident that the Fifth Circuit's determination that the Corps' determination that the instant project did not constitute a "major federal action" significantly affecting the quality of the human environment was correctly decided on the peculiar and unique factual record set forth below. The court's decision was premised upon its concurrence with the determination of the Corps, which was performed in conformity with all statutory and regulatory

criteria and guidance, and its careful examination and reliance upon CEQ guidelines on this very point.

IV. The Issues Presented In The Petition For Certiorari Have Been Rendered Moot By Virtue Of The Fact That Construction Of The Outfall Line Was Completed In 1978 And The Du Pont Plant Has Been In Operation Since August Of 1979.

Petitioner has repeatedly maintained that the courts below erred in not finding that the grant of the outfall line construction permit was a "major federal action significantly affecting the quality of the human environment" and therefore requiring the preparation of an EIS. However, continued prosecution of the instant matter in light of the failure to seek a stay against the outfall line construction is highly incongruous.

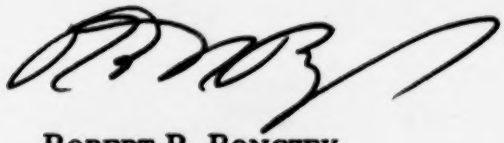
The clear purpose of the lawsuit was to require the Corps to prepare an EIS prior to the construction and operation of the Du Pont plant. When the instant action was brought, Du Pont stipulated that it would not commence outfall line construction until the District Court ruled on the merits of this case. After summary judgment was granted in favor of the Corps and Du Pont, construction on the outfall line was begun. While Petitioners filed an appeal of the lower court determination, they failed to seek an injunction against outfall line construction pending appeal to either the trial or appellate court, though they knew Du Pont was proceeding.

Construction of the outfall line was completed in October of 1978 and the plant has been fully constructed and in operation since August of 1979. Petitioner's failure to take any interlocutory action in an attempt to halt construction during the pendency of the appeal and more importantly, the actual completion of the activity of concern renders the issues sought to be raised herein as moot.

CONCLUSION

In sum, the lower court determination was a narrow one and based entirely on the unique and particular factual circumstances set forth in this record. The court's decision is not in conflict with any previous decision of this court or any decision of another circuit and does not establish any new or novel legal theories or precedents. The instant application requests that this court reexamine what is essentially a factual matter which has already received extensive regulatory agency and judicial evaluation. For the foregoing reasons, the Petition for a Writ of Certiorari filed by STB presents no issues warranting further review and should be denied.

Respectfully submitted,



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September 4, 1980

CERTIFICATE OF SERVICE

I, Robert R. Bonczek, Legal Department, E. I. du Pont de Nemours and Company, attorney for Respondent, Du Pont, do hereby certify that I have this day mailed a copy, postage prepaid, of the foregoing Response to Petition for Writ of Certiorari to:

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This, the 4th day of September, 1980.

Robert R. Bonczek

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 79-1432

SAVE THE BAY, INC.,
Plaintiff-Appellant,

v.

THE UNITED STATES CORPS OF ENGINEERS, UNITED STATES ARMY, COLONEL DRAKE WILSON, and E.I. DU PONT DE NEMOURS AND COMPANY,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi

Jan. 24, 1980.

Before BROWN, TJOFLAT and GARZA, Circuit Judges.

GARZA, Circuit Judge:

Appellant appeals from refusal of the United States Magistrate, acting on behalf of the District Court by consent of the parties, to require the United States Corps of Engineers to prepare an Environmental Impact Statement (EIS) as provided for under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §4321 *et seq.* Appellants argue the Court below erred in concluding that the environmental assessment by the district engineer was reasonable and based on substantial evidence, that the activity involved was not a major federal action significantly affecting the quality of the human environment, and that the Corps of Engineers was not required to consider the environmental consequences of the entire project but only the effects of the installation and maintenance of a twenty-four inch outfall pipeline. Appellees argue on appeal that Appellants have no

standing to challenge the actions of the Corps of Engineers. For the reasons stated below, we affirm the ruling of the United States Magistrate.

FACTS

At the time this litigation began, the defendant, E.I. Du Pont De Nemours & Co., Inc., proposed to construct and operate a massive titanium dioxide manufacturing facility in Delisle, Mississippi. Pursuant to this plan, Du Pont sought necessary authorization and permits from appropriate state and federal agencies.

On November 21, 1974, Du Pont sought authorization from the defendant, Army Corps of Engineers, to install a twenty-four inch diameter effluent line into the marshlands and Bay of St. Louis. The effluent line would carry approximately two million gallons per day of industrial wastewater and discharge it into the Bay of St. Louis. The line would be approximately 2,200 feet in length extending into the Bay and construction would require removal of 610 cubic yards of dredged material from the Bay.

On February 3, 1975, the Mississippi Air and Water Pollution Control Commission, acting pursuant to authority delegated to it by the Environmental Protection Agency, issued a National Pollutant Discharge Elimination System (NPDES) permit to Du Pont allowing discharge of the wastewater in accordance with the conditions of the permit.

Following solicitation of comments from federal, state and local agencies concerning the proposed pipeline construction permit, the Corps of Engineers announced a public hearing would be held on June 19, 1975, to answer any questions concerning issuing of the pipeline construction permit. In keeping with the Corps' prior determination that only the construction of the pipeline was subject to their regulation,

the public notice for the hearing was limited to the installation of the twenty-four inch diameter pipeline and made no mention of consideration of other aspects of the Du Pont plant in the issuance of its permit. On June 19, 1975 the hearing was held and all proponents and opponents were allowed to express their views. The proponents consisted mostly of governmental or business organizations and generally testified as to the favorable economic impact the plant would have. The opponents, consisting mostly of ecological and recreational organizations, testified generally that a potential danger to marine life existed and that an Environmental Impact Statement was necessary.

On July 17, 1975, Colonel Drake Wilson, District Engineer for the Mobile Corps of Engineers, issued a Statement of Findings assessing the impact the proposed activity would have on the environment. The Corps determined there would be no adverse effect on air quality and that water quality would be only temporarily affected. The findings also noted the issuance of the NPDES permit and that the Environmental Protection Agency had no objection to the issuance of the Corps' permit. The statement, also taking into consideration the determinations of the Mississippi Marine Resources Council and the Gulf Coast Research Laboratory, found there would be no significant adverse effect on land use, visual aesthetics, wildlife, sealife, vegetation, or historical interests. Based on the administrative record, Colonel Wilson directed that the permit be issued. The permit only authorized building the pipeline and was subject to several conditions, one of which required that Du Pont have a proper NPDES permit governing the effluent discharge.

The Plaintiff, Save the Bay, Inc., brought suit pursuant to the National Environmental Policy Act (NEPA) against the United States Army Corps of Engineers, the United States Army, Colonel Drake Wilson, Mobile District Office of the

Corps of Engineers, and Du Pont seeking declaratory and injunctive relief and monetary damages. The case was referred to the United States Magistrate by the District Judge and thereafter the defendant's Motions for Summary Judgment were granted and judgment was entered December 16, 1977 dismissing the complaint with prejudice.

STANDING

Save the Bay's complaint alleges that it is a nonprofit corporation organized under the laws of the State of Mississippi; that its membership is primarily composed of numerous full-time and part-time residents of Harrison and Hancock Counties in the State of Mississippi; and that its members will be adversely affected economically, aesthetically and environmentally.

Appellee Du Pont urges on appeal that Save the Bay has failed to establish standing under §10 of the Administrative Procedures Act, 5 U.S.C. § 702. Specifically, Du Pont argues that under *Sierra Club* v. *Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972) and *United States* v. *SCRAP*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973), Save the Bay must allege that its members "use" the area and that the proposed federal action will significantly affect their "use". Du Pont's reliance on *Sierra Club* v. *Morton, supra*, is misplaced. Here, the Plaintiff has alleged economic, aesthetic and environmental injury to its members and clearly has gone beyond mere general allegations of grievance on behalf of the public interest. Du Pont's argument, that failure to specifically allege "usage" of the geographic area is fatal to Plaintiff's standing, is without merit. An obvious inference of the English language is that residents of a geographical area "use" that geographical area. An allegation of residence coupled with an allegation of injury caused by federal action affecting the area of that residence clearly

demonstrates that the party seeking review is among those injured. We fail to see how the acts of camping, hiking, fishing or sightseeing, in a particular geographic location, held sufficient for standing in *United States* v. *SCRAP, supra,* can be considered more relevant for purposes of standing than can the act of residing in a particular geographic location.

REASONABLENESS OF THE CORPS' DECISION

The Court below noted that the standard for review of an agency determination that an Environmental Impact Statement need not be prepared is whether such determination is reasonable. This standard was set forth by this Court in *Save Our Ten Acres* v. *Kreger,* 472 F.2d 463 (5th Cir. 1973). If the determination is reasonable and made objectively and in good faith on a reviewable environmental record, the determination must be upheld. The Court below found that the environmental assessment prepared by the Corps completely and fully addressed the possible environmental consequences, that the assessment was based on substantial evidence, and that Corps complied with appropriate federal statutes and regulations. Appellants contend that the Corps' determination was unreasonable. They argue that the testimony and evidence offered in opposition to the building of the pipeline and plant should compel the conclusion that an EIS is required. The Appellants further argue that the Corps abdicated its responsibilities by failing to conduct independent studies and by considering the evaluations of other governmental agencies concerning the pipeline's potential adverse effects.

We do not agree with Appellant's contentions. Without detailing every point and counter-point of evidence before the Corps, it is clear that the Corps had testimony, evidence and comments from individuals and governmental agencies

which could lead it to reasonably conclude that an EIS would not be necessary. The Corps received and reviewed comments from several governmental agencies[1] as well as from quasi-governmental and business organizations. With little exception, all comments from governmental agencies indicated there would be no significant adverse impact on the environment. We cannot agree with Appellant that consulting with these agencies was improper. The National Environmental Policy Act, 42 U.S.C. § 4332(2)(C) requires that federal agencies consult with other agencies whose area of expertise is superior to their own. Of course, this should not be understood as allowing the Corps to base their determination solely on the comments of other agencies. Perhaps the most basic requirement of NEPA is that all federal agencies make an *independent* environmental assessment of the proposed action. The Court below correctly recognized this in distinguishing this case from *Mahelona* v. *Hawaiian Electric Company,* 418 F.Supp. 1328 (D. Hawaii 1976) wherein the Corps of Engineers erroneously considered the advisements of the EPA as determinative and consequently failed to independently determine whether or not the proposed action would have a significant impact on the human environment. For these reasons we hold the Corps' decision was not unreasonable.

A MAJOR FEDERAL ACTION?

Appellants contend the court below erred in not finding the grant of the pipeline construction permit was a "major Federal action significantly affecting the quality of the hu-

[1] Among those agencies were the following: the Environmental Protection Agency, the Department of Interior, Fish and Wildlife Service, the Department of Commerce, the National Oceanic and Atmospheric Administration, the Mississippi Marine Resources Council, the Mississippi Air and Water Pollution Control Commission, and the Mississippi State Clearing House for Federal Programs.

man environment", under 42 U.S.C. §4332(2)(C), and therefore requiring preparation of an EIS. In furtherance of this contention they argue that granting almost any Federal permit to this massive multimillion dollar manufacturing plant should trigger the obligations of NEPA.

The Court below held that the provisions of NEPA must be read in context of other language in the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §1251 *et seq.*, which places control of water pollution caused by discharges of effluents in the hands of the states and the EPA. *United States* v. *SCRAP, supra.* The court went on to hold, citing *Sierra Club* v. *Hodel,* 544 F.2d 1036 (9th Cir. 1979) and *Port of Astoria* v. *Hodel,* 8 ERC 1156, aff'd 595 F.2d 467 (9th Cir. 1979), that the issuance of the Corps' permit was not a sufficient nexus between the Corps and construction of the Du Pont plant to make the Corps a partner in such construction and thereby "federalize" the construction of the Du Pont plant. In other words, the granting of the pipeline permit by the Corps was not a "major Federal action" within the meaning of NEPA.

In addition to the Court's holding, it should also be noted that FWPCA, 33 U.S.C. §1371(c)(1),[2] ordinarily prohibits the issuance of a NPDES permit from being deemed a major Federal action significantly affecting the quality of the human environment within the meaning of NEPA. Furthermore, § (c)(2) prohibits Federal agencies, under guidance of NEPA, from reviewing any effluent limitation under a NPDES permit or from imposing any effluent limitation as a condition precedent to issuance of a license.

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[2] 33 U.S.C. §1371(c)(1) and (2) provides as follows: (c)(1) Except for the provision of Federal financial assistance for the purpose of assisting the construction of publicly owned treatment works as authorized by section 1281 of this title, and the issuance of a permit under section 1342 of this title for the discharge of any pollutant by a new source as defined in

The decision of the Court below in no way held that the Corps was precluded from preparing an EIS because of FWPCA, but instead held that the Corps' determination, of whether or not issuance of the construction permit was a "major Federal action", was limited to construction and operation of the pipeline itself and correctly held that the environmental consequences of the effluent was a factor to be excluded from their consideration.

In reaching our conclusion on this point we are not unmindful of the impact that building of this massive manufacturing plant will have on the people of Harrison and Hancock Counties, but the requirements of NEPA do not reach private acts—only "major Federal actions." We fail to see how granting of the pipeline construction permit, after issuance of a valid NPDES permit, can be considered a major Federal action. An examination of the guidelines issued by the Council on Environmental Quality, 40 C.F.R. 1500.6(c), indicates that a private project does not become a "major Federal action" merely because of some incidental federal involvement. In this case, the pipeline itself was not a necessity for operation of the plant. At least one alternative method of discharge, not requiring any Corps permit, was

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section 1316 of this title, no action of the Administrator taken pursuant to this chapter shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969 (83 Stat. 852); and (2) Nothing in the National Environmental Policy Act of 1969 (83 Stat. 852) shall be deemed to—

(A) authorize any Federal agency authorized to license or permit the conduct of any activity which may result in the discharge of a pollutant into the navigable waters to review any effluent limitation or other requirement established pursuant to this chapter or the adequacy of any certification under section 1341 of this title, or

(B) authorize any such agency to impose, as a condition precedent to the issuance of any license or permit, any effluent limitation other than any such limitation established purusant to this chapter.

available to Du Pont. We are not saying that the requisite Federal action must be a condition precedent to private action in order for preparation of an EIS to be required. But we do hold that in order for there to exist "major Federal action" some greater involvement, than is present in the case at hand, must exist.

THE PIPELINE OR THE WHOLE PLANT?

Appellant's most virgorously argued point on appeal and perhaps the point which would control the outcome of this case contests the Corps looking only to the environmental consequences of the pipeline construction and maintenance instead of considering the entire Du Pont project in its decision on whether or not to prepare an EIS.[3] Appellants assert that narrowing the scope of inquiry to the pipeline construction alone is the "blinder" approach which should be rejected by this Court. By analogy they compare the Du Pont facility to a living organism which at one end eats chlorine gas and at the other end excretes hydrocloric acid, iron, chromium, zinc, and other nastiness to the tune of 2,000,000 gallons per day. Their argument is that but for the permit there would be no pipeline; without the pipeline there would be no excretion; without the ability to excrete the plant would suffocate in its own waste. They argue that the permit "enables" the plant to exist and therefore the entire plant should be taken into consideration in whether or not the pipeline construction permit should be issued. In support of this "Enablement Theory", appellants cite *Port of Astoria* v. *Hodel, supra, Mahelona* v. *Hawaiian Electric Company, Inc., supra,* and *Citizens for Clean Air, Inc. et al.* v. *United States Army Corps of Engineers et al.,* 349 F.Supp. 696 (S.D.N.Y.1972).

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[3] We express no opinion as to the proper scope and extent of coverage of an EIS should one have been necessary.

Upon review of these cases, this Court does not disagree with their reasoning but the circumstances of those cases are clearly distinguishable from those before us. The case of *Citizens for Clean Air* preceded the FWPCA Amendments of 1972 and therefore is no longer supportive of the proposition advanced here. In *Port of Astoria* there existed a long-term contractual relationship between a Federal agency and a private corporation in which the proposed private manufacturing plant was entirely dependent upon electrical power to be supplied by the Federal agency. In *Mahelona* the problem was not that the Corps failed to examine the effects of the electrical generating plant, but rather failed to review the consequences of its own construction permit allowing a wastewater discharge facility. In short, the results of these cases do not compel the conclusion which the Appellants desire. Absent facts or circumstances which are not present here, we decline to hold that NEPA required the Corps as a matter of law to consider the entire Du Pont facility in determining whether or not an EIS was necessary.

AFFIRMED.

Supreme Court, U. S.
FILED
SEP 19 1980
MICHAEL RODAK, JR., CLERK

No. 80-171

In the Supreme Court of the United States

OCTOBER TERM, 1979

SAVE THE BAY, INC., PETITIONER

v.

UNITED STATES CORPS OF ENGINEERS,
THE UNITED STATES ARMY,
COLONEL DRAKE WILSON, AND
E.I. DUPONT DE NEMOURS AND COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the Army Corps of Engineers reasonably determined that the preparation of an environmental impact statement was not required when, under Section 10 of the Rivers and Harbors Act and

Section 404 of the Clean Water Act, the Corps issued a permit for the construction of a 2,200-foot outfall line requiring the removal of 610 cubic yards of bay bottom material.

2. Whether, after the State of Mississippi had issued a valid National Pollutant Discharge Elimination System permit authorizing the discharge of treated effluent from a manufacturing facility into the Bay of St. Louis, the Army Corps of Engineers properly limited the scope of its environmental assessment of a permit to construct the effluent discharge pipeline to the impacts of installation and maintenance of the pipeline itself.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	11
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Andrus v. *Sierra Club*, 442 U.S. 347	8
Atlanta Coalition, etc. v. *Atlanta Regional Com'n*, 599 F2d 1333	8
Berenyi v. *Immigration Director*, 385 U.S. 630	10
Biderman v. *Morton*, 497 F.2d 1141	8
Branti v. *Finkel*, No. 78–1654 (Mar. 31, 1980)	10
Citizens for Clean Air, Inc. v. *United States Corps of Engineers*, 349 F. Supp. 696	10
District of Columbia v. *Schram*, No. 78–2209, (D.C. Cir. June 18, 1980)	8
Friends of the Earth v. *Coleman*, 518 F.2d 323	8
Graver Mfg. Co. v. *Linde Co.*, 336 U.S. 271	10
Harlem Valley Transportation Ass'n v. *Stafford*, 500 F.2d 328	9
Kleppe v. *Sierra Club*, 427 U.S. 390	9

Cases—Continued: Page

Mahelona v. *Hawaiian Electric Co.*, 418 F. Supp. 1328 10

NRDC v. *Morton*, 458 F.2d 827 9

Port of Astoria v. *Hodel*, 8 E.R.C. 1156, aff'd, 595 F.2d 467 10

Save Our Ten Acres v. *Kreger*, 472 F.2d 463 9

Save the Bay v. *Administrator of the EPA*, 556 F.2d 1282 2

Save the Bay v. *MAWPCC*, Civ. No. 577-0240 (S.D. Miss. Aug. 20, 1977), appeal dismissed, No. 77-3214 (5th Cir. June 22, 1978) 8

Save the Bay, Inc. v. *United States Army*, Civ. No. S18-0340(c) (S.D. Miss.), appeal argued and submitted, No. 79-2154 (5th Cir. Aug. 12, 1980) 2, 8

Save the Bay, Inc. v. *MAWPCC*, 341 So. 2d 98 2

Sierra Club v. *Froehlke*, 534 F.2d 1289 ... 9

Stryckers Bay Neighborhood Council v. *Karlen*, 444 U.S. 223 9

Swain v. *Brinegar*, 542 F.2d 364 9

Texas Committee on Natural Resources v. *Bergland*, 573 F.2d 201 9

Vermont Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 519 9

Statutes, rules and regulations:

Clean Water Act, 33 U.S.C. (Supp. I) 1341 *et seq.*:

Section 402(b), 33 U.S.C. (Supp. I) 1342(b) 2, 8

Statutes, rules and regulations—Continued:	Page
Section 403, 33 U.S.C. (Supp. I) 1343	2
Section 404, 33 U.S.C. (Supp. I) 1344	5
Section 511(c), 33 U.S.C. (Supp. I) 1371(c)(2)(A)(B)	6
Fish and Wildlife Coordination Act, 16 U.S.C. 662	5
Marine Protection Research and Sanctuaries Act of 1972, 33 U.S.C. 1401 *et seq.*	5
National Environmental Policy Act of 1969, Section 102(2)(C), 42 U.S.C. 4332(2)(C)	3, 5
River and Harbors Act of 1899, Section 10, 33 U.S.C. 403	2, 3
Sup. Ct. R. 21.1(k)	1
33 C.F.R. 209.120 (1975)	3
33 C.F.R. 209.120(h) (1975)	3
33 C.F.R. 209.410	3
33 C.F.R. 323.2	3
40 C.F.R. Part 1500.6(a) (1979)	7
40 C.F.R. Part 1500.6(c) (1979)	7
40 C.F.R. 1508.7 (1979)	8
40 C.F.R. 1508.18 (1979)	8
Miscellaneous:	
Exec. Order No. 11991, 3 C.F.R. 124 (1978)	7-8
42 Fed. Reg. 37125 (1977)	3
45 Fed. Reg. 56779 (1980)	8

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–10a) is reported at 610 F.2d 322. The order of the court of appeals modifying its original opinion on denial of the petition for rehearing (App., *infra*, 1a–2a)[1] is not reported. The opinion of the United States magistrate (App., *infra*, 4a–19a) and the judgment of the district court (App., *infra*, 3a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1980. Rehearing was denied on March 17, 1980 (App., *infra*, 1a–2a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns the validity of a dredge and fill permit that the Army Corps of Engineers ("Corps") granted to E.I. DuPont De Nemours & Co., Inc. (DuPont), to construct a 2,200 foot effluent discharge

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[1] Contrary to Rule 21.1(k) of the Rules of this Court, the petition does not contain the court of appeals' order denying rehearing, the judgment of the district court, the opinion of the United States magistrate, or the court of appeals per curiam decision dismissing the petitioner's original appeal. Accordingly, these items are reprinted in the appendix hereto.

On November 14, 1978, the court of appeals dismissed petitioner's appeal on the ground that the judgment had been entered by a United States magistrate, rather than by a district judge (App., *infra*, 20a–21a). Thereafter, the district judge entered a judgment adopting the opinion of the magistrate (App., *infra*, 3a). The court of appeals affirmed (Pet. App. 1a–10a). The court of appeals then modified its opinion on denial of a petition for rehearing (App., *infra*, 1a–2a).

pipeline for the carriage of treated wastewater from DuPont's titanium dioxide manufacturing facility in Delisle, Mississippi, into the Bay of St. Louis. The effluent pipeline, which is 24 inches in diameter, is now in place, and the DuPont plant has been in operation since August 1979.[2]

On November 21, 1974, DuPont applied to the Corps for issuance of a dredge and fill permit under Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403, and Section 404 of the Clean Water Act, 33 U.S.C. 1344, to install the effluent pipeline at its Delisle, Mississippi, plant. DuPont estimated that instal-

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[2] DuPont was required to secure several permits from the State of Mississippi in connection with the planning of its Delisle plant. DuPont obtained a discharge permit from the Mississippi State Marine Resources Council and an air emission and National Pollutant Discharge Elimination System (NPDES) permit from the Mississippi Air and Water Pollution Control Commission. In addition, the Interstate Commerce Commission, the Corps, and the Coast Guard issued permits in connection with the construction and operation of a railroad line from Gulfport, Mississippi, to the DuPont facility. None of these permits is at issue here.

Petitioner has challenged the air emission and water discharge permits granted by the State of Mississippi in three previous cases. See *Save the Bay, Inc.* v. *MAWPCC*, 341 So.2d 98 (Miss. 1976); *Save the Bay* v. *Administrator of the EPA*, 556 F.2d 1282 (5th Cir. 1977); *Save the Bay* v. *MAWPCC*, Civ. No. 577-0240 (S.D. Miss. Aug. 20, 1977), appeal dismissed, No. 77-3214 (5th Cir. June 22, 1978). Petitioner has also sought review of two other dredge and fill permits issued by the Corps and a river crossing permit issued by the Coast Guard for construction of a railroad line from Gulfport, Mississippi, to the Delisle plant. *Save the Bay, Inc.* v. *United States Army*, Civ. No. S78-0340(c) (D. Miss.), appeal argued and submitted Aug. 12, 1980, No. 79-2154 (5th Cir.).

lation of the pipeline would require removal from the Bay of 610 cubic yards of dredged material. On February 3, 1975, the Mississippi Air and Water Pollution Control Commission, acting in a separate proceeding under a permit program approved by the Environmental Protection Agency, pursuant to Section 402(b) of the Clean Water Act, 33 U.S.C. (Supp. I) 1342(b), granted DuPont's application for a National Pollutant Discharge Elimination System (NPDES) permit to discharge treated wastewater from the Delisle plant.

The Corps considered DuPont's application under its regulations governing regulatory permits and the preparation of environmental impact statements (EIS) under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C). See, 33 C.F.R. 209.120(h) (1975); 33 C.F.R. 209.410.[3] In accordance with its regulations, the Corps issued a public notice of the DuPont permit application and sent copies of the notice to appropriate federal, state and local agencies, and to numerous environmental groups, business organizations and interested individuals. Without exception, the state and federal agencies advised the Corps that the proposed permit would not have any significant adverse impact on the environment. On June 19, 1975, the Corps held a public hearing to answer questions concerning the proposed pipeline permit and to

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[3] 33 C.F.R. 209.120 (1975) was rescinded on July 19, 1977 (see 42 Fed. Reg. 37125). New regulations now govern the issuance of Corps permits under Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act (see 33 C.F.R. 323.2). The new regulations do not affect the instant case. Corps regulations concerning the preparation of environmental impact statements were not changed by the 1977 regulations.

collect additional data for its environmental assessment. Petitioner's representatives expressed their opinions at that hearing. On the basis of its environmental assessment, the Corps would then determine whether the pipeline project was a major federal action requiring preparation of an EIS.

On July 17, 1975, the Corps district engineer issued an environmental assessment concerning the proposed permit. The district engineer determined that the pipeline would cause no adverse effect on air quality and that water quality would be only temporarily affected. The district engineer also found that construction and maintenance of the pipeline would not have any significant adverse effect on land use, wildlife, marine life, vegetation or historical interests. The district engineer did not re-evaluate the environmental impacts of the effluent discharge authorized by the NPDES permit; nor did he consider the impacts of construction and operation of the overall facility in his assessment. The district engineer concluded that the pipeline provided an environmentally sound method of diffusing treated wastewater[4] with a minimum amount of marsh destruction, and that the granting of the permit would not be a major federal action requiring preparation of an EIS. On August 6, 1975, the district engineer issued the dredge and fill permit. The permit authorized the construction of only the pipeline, and it was issued subject to several conditions, one of which

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[4] DuPont also considered several other discharge methods including deep well injection, which would not have required a Corps permit, but the company concluded that the pipeline method was the most environmentally sound.

required that DuPont have a proper NPDES permit governing the effluent discharge.

One year later, on August 5, 1976, petitioner filed this action seeking both declaratory and injunctive relief and money damages.[5] In particular, petitioner alleged that the Corps' issuance of the permit without preparation of an EIS violated Section 102(2)(c) of NEPA. The case was referred to a United States magistrate, who conducted a hearing on cross-motions for summary judgment and subsequently dismissed the action (App., *infra*, 4a–19a). The magistrate concluded that the Corps was required to consider in its environmental assessment only the effects of installation and maintenance of the effluent pipeline, rather than the environmental consequences of the entire project, and that the Corps' decision not to prepare an EIS was reasonable (App., *infra*, 17a–18a).

The court of appeals affirmed (Pet. App. 1a–10a). The court held that the Corps' conclusion that the effluent pipeline would not create any substantial adverse environmental impact was not unreasonable because it was supported by the Corps' environmental assessment and the positive comments received by other agencies (*id.* at 6a). The court also found that the Corps' decision not to reevaluate the effluent limitations set under the Mississippi State NPDES permit

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[5] Petitioner's claims for monetary relief and for relief under the Fish and Wildlife Coordination Act, 16 U.S.C. 662, Section 403 of the Clean Water Act, 33 U.S.C. 1343; and the Marine Protection Research and Sanctuaries Act of 1972, 33 U.S.C. 1401 *et seq.*, were all dismissed with prejudice (App., *infra*, 3a, 19a). Petitioner did not seek review in the court of appeals of the order dismissing these claims.

was proper under Section 511(c) of the Clean Water Act, 33 U.S.C. 1371(c)(2)(A)(B). Under Section 511(c) federal agencies may not invoke NEPA to review effluent limitations or impose limitations other than those set pursuant to the Clean Water Act (Pet. App. 8a). Finally, the court concluded that the Corps' decision to limit its environmental consideration to the construction and operation of the pipeline itself was not unreasonable (*ibid.*). While the court noted that in certain cases permissions and approvals by federal agencies may be of such significance that they effectively "federalize" an otherwise private action, thereby making the private action subject to NEPA (*id.* at 9a), the court concluded that the federal involvement here was not sufficient to require NEPA review of the entire DuPont plant (*id.* at 10a).

ARGUMENT

This case presents no issue warranting review by this Court. The judgment of the court of appeals does not conflict with any decision of this Court or any other court of appeals.

1. Petitioner first contends that the Corps should have prepared an EIS to evaluate the environmental impact of the entire plant because the "cumulative impact" of all federal permits accompanying the plant's construction and related activities, was sufficient to "federalize" these activities and thereby trigger the need for an EIS (Pet. 9–10). Petitioner bases its contention (*id.* at 3) on guidelines issued in 1973 by the Council on Environmental Quality (CEQ), which provided for the preparation of an EIS in certain circum-

stances where several federal agencies independently permit separate aspects of one major action. See 40 C.F.R. Part 1500.6(a) (1979). Although DuPont's permit was issued while those guidelines were in effect, they do not support petitioner's contention.

While CEQ guidelines required the preparation of an EIS "if it is reasonable to anticipate a cumulatively significant impact on the environment from [the] Federal action" (40 C.F.R. Part 1500.6(a)(1979)), the guidelines further explained that the action causing the impact must be subject to federal control and responsibility to be considered "federal." *Id.* at Part 1500.6(c).[6] The only federal permit at issue here is that authorizing the removal of dredged material necessary for constructing the pipeline. Significantly, the NPDES permit authorizing the discharge of treated wastewater into the Bay of St. Louis was granted not by the Corps, but by the State of Mississippi Air and Water Pollution Control Commission, and it was not at

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[6] 40 C.F.R. Part 1500.6(c) (1979) (emphasis added) provided in pertinent part :

> The identification of major actions significantly affecting the environment is the responsibility of each Federal agency, to be carried out against the background of its own particular operations. The action must be a (1) "major" action, (2) which is a "Federal action," (3) which has a "significant" effect, and (4) which involves the "quality of the human environment." *The words "major" and "significantly" are intended to imply thresholds of importance and impact that must be met before a statement is required. The action causing the impact must also be one where there is sufficient Federal control and responsibility to constitute "Federal action."*

Prior to 1977, CEQ had no authority to issue regulations, but could issue only guidelines. See Exec. Order No.

issue in this case.[7] Moreover, the effluent pipeline itself was not necessary for the operation of the plant, and at least one alternative not requiring any Corps permit was available to DuPont. In these circumstances, the court of appeals was correct in concluding that the issuance of a pipeline construction permit was not a major federal action requiring an EIS concerning the environmental impact of the entire DuPont project, given the existence of a valid State NPDES permit.[8]

2. Petitioner's principal contention (Pet. 10) is that the court of appeals erred in holding that the Corps

11991, 3 C.F.R. 124 (1978). See also *Andrus* v. *Sierra Club*, 442 U.S. 347, 357-358 (1979). CEQ's regulations altered the former guidelines (see 40 C.F.R. Parts 1508.7, 1508.18 (1979)), and the Corps has also amended its regulations (see 45 Fed. Reg. 56779 (Aug. 25, 1980)).

[7] NEPA applies, of course, only to federal actions or federally funded actions, not to state or local actions. *Atlanta Coalition, etc.* v. *Atlanta Regional Com'n*, 599 F.2d 1333, 1347 (5th Cir. 1979); *Friends of the Earth* v. *Coleman*, 518 F.2d 323, 327-329 (9th Cir. 1975); *Biderman* v. *Morton*, 497 F.2d 1141, 1147 (2d Cir. 1974). In addition, NEPA does not apply to new source NPDES permits issued by states having approved NPDES permit programs in accordance with Section 402(b) of the Clean Water Act, 33 U.S.C. (Supp. I) 1342(b). *District of Columbia* v. *Schram* No. 78-2209 (D.C. Cir. June 18, 1980), slip op. 16 n.14.

[8] The only other federal permits issued in connection with the DuPont plant were permits necessary for the construction and operation of a railroad line from Gulfport, Mississippi, to the DuPont plant. These permits were not necessary to the operation of the DuPont plant itself, and they were not challenged in this case. Petitioner unsuccessfully challenged those permits in a separate proceeding, which is currently on appeal in the Fifth Circuit. *Save the Bay* v. *United States Army*,(Civ. No. S18-0340(c) (S.D. Miss.), appeal argued and submitted Aug. 12, 1980, No. 79-2154 (5th Cir.).

acted reasonably in limiting its consideration of potential environmental impacts to the construction and maintenance of the effluent pipeline, rather than considering the entire DuPont plant, in deciding not to prepare an EIS. In the particular circumstances of this case, the court of appeals' decision was correct.

The requirements of NEPA are to be construed in light of a "rule of reason." See, *e.g.*, *Sierra Club* v. *Froehlke*, 534 F.2d 1289, 1299 (8th Cir. 1976); *Harlem Valley Transportation Ass'n* v. *Stafford*, 500 F.2d 328, 337 (2d Cir. 1974); *NRDC* v. *Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972). Only if the Corps' decision was unreasonable may it be reversed. See, *e.g.*, *Kleppe* v. *Sierra Club*, 427 U.S. 390, 412 (1976); *Texas Committee on Natural Resources* v. *Bergland*, 573 F.2d 201, 206 (5th Cir. 1978); *Save our Ten Acres* v. *Kreger*, 472 F.2d 463, 465 (5th Cir. 1973). And, in reviewing an agency's determination, "[t]he task of the court is not to decide where to draw the line, but to review the matter to ascertain whether the agency has made a reasonable choice." *Swain* v. *Brinegar*, 542 F.2d 364, 369 (7th Cir. 1976). See also *Kleppe* v. *Sierra Club*, *supra*, 427 U.S. at 410 n.21.[9] In view of the limited federal action being taken here, the court of appeals correctly sustained the reasonableness of the Corps' decision to consider in its environmental as-

[9] While NEPA establishes significant substantive goals for the nation, the duties it imposes upon agencies are "essentially procedural." *Stryckers Bay Neighborhood Council* v. *Karlen*, 444 U.S. 223, 227 (1980); *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 558 (1978). Here, petitioner has neither alleged nor shown that the procedural requirements of NEPA were not met.

sessment the environmental impacts of only the construction and maintenance of the effluent pipeline. The DuPont facility is a privately financed project, and the State of Mississippi issued all of the permits necessary for its operation. The sole federal involvement in the DuPont project was a dredge and fill permit needed for construction of an effluent pipeline which, as previously noted, was not necessary to the operation of the facility.

Petitioner's contention that the decision below conflicts with decisions in other circuits (*Port of Astoria* v. *Hodel*, 8 E.R.C. 1156 (D. Ore. 1975), aff'd, 595 F.2d 467, 477 (9th Cir. 1979); *Citizens for Clean Air, Inc.* v. *United States Corps of Engineers*, 349 F.Supp. 696, 700 (S.D.N.Y. 1972); and *Mahelona* v. *Hawaiian Electric Co.*, 418 F. Supp. 1328, 1336 (D. Hawaii 1976)), is unfounded. The Fifth Circuit, upon whose analysis (Pet. App. 10a) we rely, carefully considered each of these decisions and concluded that they were inapplicable to the circumstances presented here. In each of the cases petitioners invoke, the court of appeals found dispositive certain facts that are absent here. Consequently, the court of appeals concluded that the Corps was not required to consider the entire DuPont facility in determining whether an EIS was necessary. Further review of that fact-bound issue is unwarranted. See, *e.g.*, *Branti* v. *Finkel*, No. 78-1654 (Mar. 31, 1980), slip op. 5 n.6; *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635-636 (1967); *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1980

APPENDIX

SAVE THE BAY, INC., PLAINTIFF-APPELLANT,

v.

THE UNITED STATES CORPS OF ENGINEERS,
THE UNITED STATES ARMY,
COLONEL DRAKE WILSON AND
E. I. DUPONT DE NEMOURS & COMPANY, INC.,
DEFENDANTS-APPELLEES

No. 79-1432.
United States Court of Appeals,
Fifth Circuit.

March 17, 1980.

Appeal from the United States District Court for the Southern District of Mississippi; Dan M. Russell, Jr., Judge.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion January 24, 1980, 5 Cir., 1980, 610 F.2d 322).

Before BROWN, TJOFLAT AND GARZA, Circuit Judges.

PER CURIAM:

We withdraw the first sentence of our opinion in the above styled cause and substitute therefor the following:

> Appellant appeals from the District Court's adoption and entry of judgment in conformity with the

refusal of the United States Magistrate, acting on behalf of the District Court by consent of the parties, to require the United States Corps of Engineers to prepare an Environmental Impact Statement (EIS) as provided for under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 *et seq.*

In all other respects, the Petition for Rehearing filed on behalf of Save The Bay, Inc., is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

JUDGMENT

This cause having come before the Court on remand from the Court of Appeals for the Fifth Circuit because the final judgment in this case was entered by a United States Magistrate, the Circuit Court having determined subsequent to the entry thereof that a Magistrate cannot enter a final judgment, even with the consent of the parties, and this Court, having fully reviewed this matter, hereby adopts the opinion filed by the Magistrate and enters Judgment in accordance therewith. Accordingly, it is hereby

ORDERED AND ADJUDGED that the motions of the Defendants, United States Corps of Engineers, the United States Army, Colonel Drake Wilson, and E.I. DuPont DeNemours for summary judgment are hereby granted, the cross motion of the Plaintiff, Save the Bay, Inc., for summary judgment is hereby denied, and this case is dismissed with prejudice, all parties to bear their own costs.

ORDERED AND ADJUDGED this the 24 day of January, 1979.

/s/ HAROLD COX
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF MISSISSIPPI
SOUTHERN DIVISION

No. S76-198 (C)

SAVE THE BAY, INC., PLAINTIFF

v.

THE UNITED STATES CORPS OF ENGINEERS,
THE UNITED STATES ARMY,
COLONEL DRAKE WILSON, AND
E.I. DU PONT DE NEMOURS AND COMPANY,
DEFENDANTS

FINDING OF FACT AND CONCLUSION OF LAW

This cause having come for hearing on motions of the defendants for summary judgment, affidavits, and documentary evidence and the court having considered the same, hereby enters the following Finding of Fact and Conclusion of Law:

FINDING OF FACT

1. On November 21, 1974, the United States Army through the Corps of Engineers (Corps) received an application from E.I. du Pont de Nemours and Company (Du Pont) for a permit for the installation of a 24 inch effluent outfall line extending from Du Pont's proposed plant approximately 2200 feet into the Bay of St. Louis, Mississippi.

2. The Corps issued a Public Notice on December 9, 1974 to solicit comments from State, Federal and Local agencies and from the public concerning such permit. This notice was mailed to *123* addressees.

3. Such Applications and Notice provided that no discharge from the outfall line would occur unless Du Pont obtained a National Pollutant Discharge Elimination System (NPDES) permit authorizing such discharge.

4. Various responses to such public notice were received by the Corps, including:

a. Letter dated 12/23/74 from the Fish and Wildlife Service noting that it was reviewing Du Pont's proposed NPDES permit for discharge through the outfall.

b. Letter dated 1/23/75 from Du Pont advising the Corps that it was revising its application to meet objections that Du Pont had received.

c. Letter dated 2/7/75 from the Mississippi State Clearing House for Federal Programs which informed the Corps that the works was consistent with State goals and policies. This letter also enclosed a copy of a permit issued by Mississippi Marine Resources Council to Du Pont which found that the proposed project would have no significant adverse impact on coastal wetlands.

d. Letter dated 2/25/75 from the Environmental Protection Agency to the Corps advising the Corps that EPA had no objections to the issuance of the permit since the activity associated with the construction of the outfall would have only temporary and minimal ecological effects. The letter further noted that Mississippi Air and Water Pol-

lution Control Commission was issuing a NPDES discharge permit with which EPA concurred.

e. Letter dated 3/4/75 from Fish and Wildlife Service advising the Corps that the project would have no adverse effects on fish and wildlife resources and therefore it had no objection to the permit.

f. Letter dated 3/5/75 from EPA advising the Corps that NPDES authority had been delegated to the State of Mississippi; that requirements of NEPA Section 102(2)(c) were no longer applicable and that EPA would not prepare an Environmental Impact Statement (EIS), and would not require Mississippi to do so.

g. Letter dated 3/14/75 from the National Marine Fisheries Service advising the Corps that it would not make a definite recommendation because it was unable to adequately investigate it.

h. Letter from Mrs. Chris Jacob, conservation chairman, Sierra Club, undated, objecting to dredging marshlands to discharge into the Bay of St. Louis and to altered land usage.

i. Letter from Save the Bay, Inc., dated 5/21/75, responding to the Corps' Notice of Public Hearing, objecting to the issuance of the permit for various reasons and requesting that hearing be postponed.

5. The Corps issued a Notice of Public Hearing on March 27, 1975, which fixed June 19, 1975, as date for a public hearing on the questions of issuing such permit.

6. Pursuant to Notice, such hearing was held at the West Side Community Center, Gulfport, Mississippi, from 1:00 p.m. to 3:45 p.m. The applicant, proponents and opponents were given unlimited time for their

presentations. A verbatim transcript of the hearing, including all written statements and data were made a part of the record.

7. Included in the record were written objections from 20 persons, or organizations. Proponents included Gulfport Jaycees, Mississippi State Port Authority, City of Pass Christian, City of Long Beach, Harrison County Development Commission, Gulfport Area Chamber of Commerce, and Governor William Waller.

8. On July 17, 1975, Colonel Drake Wilson, District Engineer for Mobile Corps issued a Statement of Findings. This statement reviewed the proposed permit, assessed the environmental effects and impacts upon air quality and water quality. It determined that the work (outfall line) would have no adverse effect on air quality and the water quality would be effected temporarily and such effects would be localized by the construction of the outfall line. The findings also noted that Du Pont had received an NPDES permit from the State of Mississippi for the discharge and that the EPA had participated thoroughly in the formulation of the permit and concurred in the issuance of the permit. Additionally, the EPA had no objection to the issuance of the Corps permit. It was also noted that the Mississippi Marine Resources Commission had issued its permit for the outfall line.

9. In addition, Colonel Wilson made additional assessments of the environmental effects and impacts regarding (a) land use; (b) noise; (c) visual aesthetics; (e) waste disposal; (f) wildlife; (g) fisheries; (h) salt marsh and estuarine bottom; (i) beach; (j) historical.

10. The statement found that the public interest would be served since the proposed outfall line would provide an "environmentally sound method of diffusing the treated wastewater [from the Du Pont plant] and the outfall site offers the minimum amount of marsh destructions."

11. Various agencies' comments were listed as were the names of opponents and proponents who submitted written comments.

12. Based upon the review of the entire record, Colonel Wilson concluded that the environmental effects associated with the proposed action are such that preparations of an environmental impact statement was not required. He also noted as a matter of record that EPA specifically excluded the effluent from the Du Pont plant as requiring an environmental statement, and noted that EPA had advised the Corps that EPA would not prepare an EIS on the DuPont plant. He also noted that no state or federal agency was opposed to the issuance of the permit and no agency had recommended conditions or restrictions to such permit.

13. Based upon such record, the environmental assessment the comments of various persons, and state and federal agencies, he directed that the permit be issued on June 17, 1975.

14. On August 6, 1975, the United States Army, through the Corps issued the permit to Du Pont. The permit allows Du Pont to construct an outfall pipe, with attendant structures in the Bay of St. Louis, and to dredge a trench in the Bay bottom to lay the pipe. The work was described as follows:

"Installation of a 24 inch diameter effluent outfall line extending approximately 2200 feet into the Bay, by dredging a trench. Approximately 610 cu. yds. of material will be dredged and deposited in an upland disposal site on the applicant's property. Installation of two dolphins for the purpose of displaying a warning sign over the outfall line. A continuous fender structure with warning lights at the center and both ends will be erected in order to prevent accidental navigation through the diffuser section. The effluent outfall line will carry wastewater discharge from a proposed titanium dioxide manufacturing plant. Work will front applicant's property, St. Louis Bay, Harrison County, Mississippi, in accordance with the plans and drawings attached hereto which are incorporated in and made a part of this permit subject to the following conditions."

15. The permit contains 14 general conditions, and the following special conditions:

"This permit does not authorize any discharges subject to the National Pollutant Discharge Elimination System, Public Law 92-500, as required from the appropriate permitting agency."

16. The special condition cited in Section 15 of this Finding of Fact was satisfied by the issuance by the Mississippi Air and Water Pollution Control Commission permit board of NPDES permit No. MS 0027294 to Du Pont on February 3, 1975.

17. The action of the Corps in issuing the outfall permit is limited to the authorization of the activity specified in said permit. The activity of the Corps in this regard is not major federal action significantly affecting the quality of the human environment.

18. The environmental assessment contained in Colonel Drake Wilson's Statement of Findings is reasonable, and is based upon substantial evidence.

19. The defendant, Du Pont, has aided and assisted and abetted the Corps in securing the permit, but such activity is permissible as it is in the case of any applicant to the Corps for a permit, and there is no evidence that such activity exceeded permissible bounds.

20. On February 17, 1977, this court held a hearing on Defendant's Motion for Summary Judgment, and Plaintiff's Cross-Motion for Summary Judgment. Since such hearing three separate but related cases have been disposed of or are pending, of which this court takes judicial notice under Rule 803 and Rule 201 of the Federal Rules of Evidence. These three matters are:

I. RELATED LITIGATION

(a) *Case 1. Save the Bay, Inc. v. Mississippi Air and Water Pollution Control Commission*, in the matter of Air Emissions Permit No. 1020-00115 and Wast Water Discharge Permit No. MS0027294 issued to E.I. DuPont de Nemours & Company, pending before the Mississippi Air and Water Pollution Control Commission.

Case 2. Save the Bay, Inc. vs. Administrator of the Environmental Protection Agency, No. 75-1633, United States Court of Appeals, Fifth Circuit, decided on August 5, 1977.

Case 3. Save the Bay, Inc. vs. Mississippi Air & Water Pollution Control Commission; Environmental Protection Agency, Douglas M. Costle, Administrator

of the Environmental Protection Agency, and the United States of America, Civil Action No. S77-0240(N), United States District Court, Southern District of Mississippi, Southern District of Mississippi, Southern Division, dismissed on August 20, 1977.

(b) The case, *sub judice*, as do Cases 1 through 3, arise out of the efforts of Save the Bay, Inc. to prevent E.I. DuPont de Nemours & Company (DuPont) from constructing a large manufacturing facility on the north shore of Bay St. Louis, Mississippi, and to prevent it from discharging treated water effluent in waters which discharge is permitted under the permits referred to in Case No. 1 above.

(c) One of the attacks upon the Corps of Engineers permit to construct the outfall line in the case *sub judice*, is that the Corps of Engineers failed to prepare an Environmental Impact Statement regarding the effects of the discharge of treated waste water into the Bay of St. Louis, which the MAWPCC has permitted, the EPA has approved, and that such discharge violates the FWPCA standards. Though the Cases numbered 1 through 3 are against defendants other than the two defendants in the case *sub judice*, nevertheless, all four cases have the same objective, and that is to prevent DuPont from discharging waste water into the Bay through such out-fall line and thus prevent construction of the Plant. For this reason, the status of such cases are material to a disposition of this case.

II. STATUS OF RELATED LITIGATION

(a) *Case 1.* This case represents the direct attack of Save the Bay, Inc. against the air and water effuent

discharges. The case is the result of a decision of the Mississippi Supreme Court in the matter of *Save the Bay, Inc. v. MAWPCC*, No. 49,509, dated November 23, 1976, which held that the Mississippi Air and Water Pollution Control Act, 49-17-1 through 49-17-43, required the MAWPCC to grant to Save the Bay, Inc. a fair hearing. This decision did not set aside such permits, but only required such hearing. Pursuant to the mandate of such Court, MAWPCC has been conducting hearings and has officially recorded its intent to render its decision no later than December 9, 1977.

(b)(1) *Case 2*. This case represented an attack upon the action of the Environmental Protection Agency in granting to the MAWPCC the authority to issue NPDES permits pursuant to the Federal Water Pollution Control Act Amendments 33 USC Sec. 1251-1376, and also attacked EPA's refusal to veto the MAWPCC permit issued to DuPont.

(b)(ii) The Court held that full administrative development in the form of specific requests by Save the Bay, Inc., to EPA for withdrawal of NPDES authority to MAWPCC and an official determination by EPA must preceed judicial reviews and therefore dismissed the case without prejudice on that issue. As to EPA's alleged failure to block the permit, the court held that Courts of Appeal lack original jurisdiction to review EPA's omission to veto a proposed permit under a state program and dismissed Save the Bay, Inc.'s claim. The Court summarized District Court reviewability of EPA's decision not to issue a permit. The Court stated that such review must be limited to two (2) narrow considerations: Whether a proposed permit

contained a violation of applicable federal guidelines that the agency has failed to consider; and whether unlawful factors have tainted EPA's exercise of discretion.

(b) (iii) The Court of Appeals dismissed the case without prejudice on the first issue, and dismissed with prejudice on the other two issues. It necessarily follows that at this time, the MAWPCC is the duly authorized agency of the State of Mississippi which EPA has delegated its NPDES permitting authority, and that this line of attack has failed.

(c) (i) *Case 3*. This case was brought as an original action against EPA and MAWPCC by Save the Bay, Inc. Such suit was filed on or about July 11, 1977, and sought, among other things, a Temporary Restraining Order cancelling the hearing referred to in Case 1; a mandatory injunction directing the MAWPCC to enjoin DuPont from continuing the construction of its plant; cancellation of the MAWPCC's permits; designation of EPA as an appropriate agent to conduct any further hearings; preparation by EPA of an EIS pursuant to NEPA; a declaratory judgment concerning issues raised in the pleadings regarding such permits; a *writ* of *mandamus* or injunction to EPA directing it to withdraw EPA's authorization of MAWPCC's authority to issue NPDES permits; a monetary judgment in favor of Plaintiff in the amount of $150,000.00 and costs, damages, and attorneys fees.

(c) (ii) Plaintiff noticed a Motion for Hearing on its prayer for a Temporary Restraining Order for August 19, 1977. Judge Nixon heard this motion and found that Save the Bay, Inc., had made no showing of im-

mediate and irrepairable harm, injury, loss or damage; no showing that Plaintiff would be successful on the merits; and found that a cancellation of the MAWPCC hearings (Case # 1) would not be in the public interest; that MAWPCC and EPA had no authority to halt construction of the plant; and EPA had no authority to cancel DuPont's permits.

(c) (iii) The court recessed the hearings on August 19, 1977, and stated that it would rule the following day on Defendants Motion to Dismiss. One of the issues raised by the Defendant's Motion to Dismiss was the standing of the Plaintiff to bring such suit. Save the Bay, Inc. alleged in Case No. 3, as in the case *sub judice*, that is had standing to bring such suit. The Court found from an examination of the pleadings and proof before it that Save the Bay, Inc., had no standing to sue MAWPCC or EPA.

(c) (iv) Another issue before the Court in Case 3 was the allegation of Save the Bay, Inc., that the discharge of treated waste water in the Bay of St. Louis was a "new source" and that EPA was required to prepare an Environmental Impact Statement. The Court found that such discharge was not a "new source" and that EPA was not required to prepare an EIS.

(c) (v) Such opinion was incorporated in Judge Nixon's order by reference, and the Court entered its order dated August 20, 1977, dismissing the Complaint with prejudice. Plaintiff gave timely notice of appeal, but the record on appeal has not been lodged with the Circuit Court of Appeals for the Fifth Circuit.

(c) (vi) The Court finds that the MAWPCC has not been enjoined from proceeding with such hearing re-

ferred to as Case 1, and that such hearing is proceeding.

III. EFFECT OF SUCH DECISIONS:

(a) MAWPCC Permit:

The efforts of the Plaintiff to attack the EPA approved permit to discharge treated waste water into the Bay of St. Louis, if successful, would have suspended the efficacy of the Corp of Engineers Permit, as one of the conditions of the COE permit was that such discharge comply with MAWPCC standards. The direct attack against MAWPCC's authority to issue such permit as represented by Case 2 has failed. The efforts to suspend the efficacy of such permit represented by Case 3 pending a "fair hearing" before the MAWPCC in Case 1 has failed. The Court finds that the MAWPCC has exclusive jurisdiction to issue such permit, that such permit is in full force and effect, and that the condition in the COE permit requiring DuPont to secure the MAWPCC permit is satisfied.

(b) Standing to Sue:

Based upon the record before the Court in the case *sub judice*, and the Court's findings in Case 3 that Save the Bay, Inc., did not have standing to bring such suit, this Court finds as a fact that the Plaintiff has failed to allege or show any facts which establish that it is aggrieved, adversely affected, wronged or has sustained economic injury as a result of the action of the Issuance of the Corps of Engineers permit which is the subject of this case. The decision of the Court in Case 3 is not *res adjudicata*, nor is collateral *estoppel* involved. Such decision is persuasive, how-

ever, and the Court finds in this case that Save the Bay, Inc., represents six individuals who reside principally in New Orleans, Louisiana, and who maintain vacation homes in Hancock County, Mississippi. The remaining four individuals represented by Save the Bay, Inc. reside in Hancock County. No persons who are represented by the Plaintiff reside in Harrison County, Mississippi, nor have any of such persons alleged or proved that they have or will be aggrieved, adversely effected, wronged, or will sustain injury by the construction of such outfall line or discharge of treated waste water from such outfall line.

CONCLUSIONS OF LAW

1. The standard for review of the threshold determination that an EIS need not be prepared is whether such determination is reasonable. *Save Our Ten Acres v. Kreger*, 472 F.2d 463 (5th Circuit, 1973).

2. In applying the test of reasonableness, the threshold determination is still for the agency to make and such determination should be upheld if the determination was reasonable and was made objectively and in good faith on a reviewable environmental record. *Rucker v. Willis*, 484 F2d 158, (4th Circuit, 1973); *Morningside Renewal Committee v. U.S. Atomic Energy Comm.*, 482 F.2d 234 (2nd Circuit, 1973), cert. denied 417 U.S. 951, 94 S.Ct. 3080, 41 L. Ed. 2d 672; *Hendrickson v. Wilson*, 374 F. Supp. 856 (D.C. Mich., 1973).

3. The provisions of NEPA must be read in the context of other statutes such as the specific language in the Federal Water Pollution Control Act which places

the control of water pollution caused by discharges of effluents in the hands of the states and the Environmental Protection Agency. *U.S. v. SCRAP*, 412 U.S. 669, 43 S. Ct. 2405, 37 L.Ed. 2d 254.

4. Congress placed the responsibility for the control of effluents in the hands of the state and the Environmental Protection Agency. 33 U.S.C. Sec. 1251(b), (d), 1311, 1341, 1342, and 1371.

5. The Corps, while it could rely upon the determination of EPA and the state that the effluent would not have a significant effect on the environment, had to make its own determination on the effects caused by the activity authorized by the Corps permit. *Mahelona v. Hawaiian Electric Company*, 417 F. Supp. 1328 (D. Hawaii 1976).

6. The issuance of the Corps permit was not a sufficient nexus between the Corps and the construction of the DuPont plant to make the Corps a partner in such construction and thereby "federalize" the construction of the DuPont plant. *Sierra Club v. Hodel*, F.2d (9th Circuit, 1976) (7 ELR 20008); *Port of Astoria v. Hodel*, F. Supp. (D. Ore., 1975) (8 ERC 1156).

7. The environmental assessment prepared by Colonel Drake Wilson in his statement of Findings dated July 17, 1975, addresses the possible environmental consequences of the activity authorized by the Corps permit, is based upon substantial evidence and is reasonable. The procedures followed by the Corps comply with appropriate federal regulations and statutes. The Corps determination not to prepare an Environmental Impact Statement was proper.

8. The Corps fulfilled its objection under the Fish and Wildlife Coordination Act. *Sun Enterprises v. Train*, 532 F2d 280 (2nd Circuit, 1976).

9. Section 301(a) of the Federal Water Pollution Control Act imposes no requirements on the Corps during its issuance of the DuPont permit. 33 U.S.C. 1311(a).

10. The Corps complied with the requirements of Section 404 of the Federal Water Pollution Control Act. 33 U.S.C. 1251, 1341.

11. The Mississippi Air and Water Pollution Control Commission through its permit Board, has exclusive jurisdiction to issue Waste Water Discharge Permit No. MS0027294 to DuPont. *Save the Bay, Inc., v EPA*, No. 75-1633, 556 F2d 1281 (5th Circuit).

12. Such Permit is, unless otherwise modified or revoked, in full force and effect. *Save the Bay, Inc., v. MAWPCC*, 341 So2d 98; *Save the Bay, Inc. v. EPA*, No. 75-1533, 556 F2d 1282, (5th Circuit).

13. Such Permit is in full force and effect, and satisfies the Conditions of the Corps of Engineers Permit relating to waste discharges into the Bay of St. Louis.

14. Save the Bay, Inc., has no standing to seek review of a Permit issued by the Corps of Engineers to DuPont. *Sierra Club* v. *Morton*, 405 US 727, 31 L.Ed 2d, 636, 92 S.Ct. 1361, (1971); *Save the Bay, Inc.*, v. *MAWPCC, et al*, Civil Action S77-0204 (N), USDC, Southern District of Mississippi, Southern Division, (1977).

15. The issuance of the COE permit was proper.

16. There is no cause of action stated against DuPont.

17. There is no genuine issue of fact, and as a matter of law, Defendants are entitled to Summary Judgment.

18. Such complaint is dismissed with Prejudice at costs of Plaintiff.

ORDERED this the 16th day of December, 1977.

JOHN ROPER

UNITED STATES MAGISTRATE

7

In the United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 78-1310
Summary Calendar*

SAVE THE BAY, INC., PLANTIFF-APPELLANT,

v.

THE UNITED STATES CORPS OF ENGINEERS,
UNITED STATES ARMY,
COLONEL DRAKE WILSON AND
E. I. DUPONT DENEMOURS AND COMPANY, INC.,
DEFENDANTS-APPELLEES.

Appeal from the United States District Court for the Southern District of Mississippi

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(NOVEMBER 14, 1978)

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* Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

Before CLARK, GEE and FAY, CIRCUIT JUDGES.

PER CURIAM:

In this environmental suit about the discharge of pollutants into Bay St. Louis, all parties consented to trial and the entry of final judgment by the magistrate and the district court approved this consent. The resulting judgment is appealed to us, but it is not appealable. Magistrates cannot enter final judgments, even with the consent of the parties. *Carmena* v. *International Union of Operating Engineers*, Local 406, 572 F.2d 1031 (5th Cir. 1978).

As in *Carmena*, we therefore dismiss the appeal without prejudice to a future appeal following the district court's review of the magistrate's actions and the entry of a final judgment by the district court.

DISMISSED.

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